BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS.: 0121015483 & 0121015484

LYNDSAY STOVER,	)	Case Nos. 481-2013 & 480-2013
	)	
Charging Party,	)	
	)	
vs.	)	HEARING OFFICER DECISION
	)	AND NOTICE OF ISSUANCE OF
THE BUM STEER AND JAY WILSON,	)	ADMINISTRATIVE DECISION
	)	
Respondents.	)	

* * * * * * * * * *

I. Procedure and Preliminary Matters

On April 23, 2012, Charging Party Lyndsay Stover filed a complaint with the Montana Department of Labor and Industry's Human Rights Bureau (HRB) against Respondent Jay Wilson and on August 23, 2012, against Respondent the Bum Steer. She alleged that Wilson and the Bum Steer discriminated against her in employment because of sex and retaliated against her for engaging in protected Human Rights activities. On September 27, 2012, the department gave notice that the consolidated two complaints would proceed to a contested case hearing, and appointed Terry Spear as Hearing Officer.

The contested case hearing proceeded on April 8 and 9, 2013, and then again on June 25 and 26, 2013, all in Missoula, Montana. Stover attended with her counsel, Robert Terrazas, PC and Elizabeth A. Clark, Terrazas Law Offices. Jay Wilson attended and the business attended through a designated representative, Sue Wilson, with counsel for both the respondents, Richard R. Buley, Tipp & Buley, PC.

The following persons testified under oath, in the order indicated, and in person except where otherwise noted.

1. Russell Stewart
2. Susan (Sue) Wilson (1st time)
3. Jay Wilson (1st time)
4. Pam Drogitis
5. Adrienne Vierzba
6. Sandra (Sandi) Moore
7. Kathy Cahalan
8. Kimberly Cobos (by phone)
9. Nicole Kropp
10. Caitlin Hoover
11. Robert Schunk
12. Carol Blum
13. Linsey Langlois
14. Doug MacDonald
15. Tara Darling (by phone)
16. Lyndsay Stover (1st time)
17. Sam Mahlum (by phone)
18. Lyndsay Stover (2nd time)
19. Sue Wilson (2nd time)
20. Jay Wilson (2nd time)
21. Tracy Perry
22. Marcie Paske
23. Dixie Perry
24. Polly Larson
25. Jan Hubbell
26. Terry Mateka (by phone)
27. Lyndsay Stover (3rd time)

The Hearing Officer admitted the following Exhibits into evidence, with restrictions upon admission in parentheses where applicable: Exhibits 2, 3, 4, 5, 6, 7, 8, 12 (admitted as evidence of the responses of Sue Wilson and Jay Wilson upon Exhibit 12), 13, 14, 15, 17, 18, 19, 20, 21, 23, 27, 30.1, 30.2, 31 and 103.

Stover filed her last post-hearing argument on September 23, 2013. On that same date, the respondents filed a "Corrective Report" noting a typographical error in their initial post-hearing filing, and giving notice they did not intend to file a reply brief. The case was deemed submitted for decision on that date.

II. Issues

The key issues are whether the respondents illegally discriminated and/or retaliated against Stover, and, if so, what damages she should recover and what affirmative relief should be required. A full statement of issues appears in the "Final *[sic]* Final Prehearing Order:" (hereafter "FPO") .

III. Findings of Fact

Introduction;
The Respondents, the Bar, Its Management, Jay Wilson's General Conduct

1. Respondent "Bum Steer" is a bar and restaurant located in Florence, Montana, solely owned by a Montana corporation, RJ's Bum Steer, Inc., which does business as the Bum Steer. The shareholders and directors of the corporation are Respondent Jay Wilson and his spouse, Sue Wilson. They each own 50% of the stock. Respondent Jay Wilson is the president of the corporation and Sue Wilson is the secretary. At hearing, Sue Wilson was the Designated Representative of the Bum Steer.

2. In the respondents' proposed decision, Sue Wilson was called "Sue Jones." However, when first called as a witness, she identified herself under oath as Susan Elaine Wilson, an owner of the Bum Steer and a member of the Wilson and Jones Limited Liability Company. She is one person, who is and has been known as Susan Elaine Wilson, Susan Elaine Jones, Susan Wilson, Susan Jones, Susan E. Wilson, Susan E. Jones, Sue Wilson and Sue Jones. She is referenced in this decision as "Sue Wilson."

3. RJ's Bum Steer, Inc., purchased the Bum Steer in March 2007. Prior to purchasing the Bum Steer, Jay and Sue Wilson had owned and operated bars in California.

4. Jay and Sue Wilson married in 2010. They live in a residence attached to the building in which the Bum Steer operates. They receive mail at the same post

office box and live at the same address as the Bum Steer. Jay and Sue Wilson are also the sole members of Wilson & Jones, LLC, which has the same post office box as the Wilsons and the Bum Steer. FPO, "IV. Uncontested Facts," p. 4, Nos. 22, 23.

5. Sue Wilson was the person responsible for doing all hiring, firing and employee counseling for the corporation. She also did both payroll and bookkeeping. She was often present in the business premises during the day, either in the office area or in any other part of the business premises, depending upon what she was accomplishing.

6. Jay Wilson was responsible for opening the bar at 8:00 a.m., managing and running the bar and liquor store until approximately 11:00 a.m. and preparing food for the restaurant for the day. Thereafter, he might be in the business premises to do repair work or other specific tasks, he might be in the business premises just to look in and see who was there and what was happening, and he might be in the business premises to supervise. Any time he was in the business premises, he had authority to supervise any employee at work in those business premises.

7. Russell Stewart was a friend of the Wilsons who needed work and was living with the Wilsons during the time when many of the events involved in this case happened. The Wilsons decided to utilize him as a supervisor at the Bum Steer, for the mutual benefit of all three of them and the corporation. His schedule was not proved with any certainty, although he appears to have been on the premises to supervise and discharge management closing responsibilities during many of the night shifts. He appears from the evidence to have often been an inattentive supervisor.

8. Terry Mateka was a Florence resident who patronized the Bum Steer since 2009, got to know Jay Wilson, and, starting in 2011, worked for the bar, sometimes doing scheduling and banking for the Wilsons when they were out of town, as well as taking care of equipment malfunctions and helping with managing as requested by the Wilsons. Transcript of Hearing, Volume III, page 617, lines 6-25 and 618, lines 1-10[1] and Vol. IV, 733:2-11.

9. The Wilsons (one or both of them) sometimes came into the bar in the evening, to check on business or to socialize and have drinks. Once in the bar, they might act as customers, workers or supervisors, perhaps switching between these roles as they deemed appropriate. Stewart sometimes frequented the bar as a patron when he was off duty. He also sometimes drank in the bar while supervising.

---

[1] Transcript references will hereafter be by volume number, page number and inclusive line references, *i.e.*, Vol. III, 617:6 - 618:10, *or* Vol. IV, 733:2-11.

10. Substantial and credible evidence of record established that during all pertinent times all employees of the Bum Steer who were not involved in management were women. During all pertinent times, these women were hired as and primarily worked as bartenders, but might also be assigned other duties as needed. They typically worked day shifts, with hours that might vary depending upon needs, and/or night shifts, which typically started after 5:00 p.m. and ran through closing time with clean-up and lock-up closing duties, unless for some reason the employee was released earlier by schedule or by management decision at the time.

11. The Bum Steer had about 16 video cameras that covered the interior and exterior of the building. The video feed could be viewed live, or the recording could be replayed, on a monitor located in Jay and Sue Wilson's residence, connected to and located in an adjacent portion of the building. FPO, "IV. Uncontested Facts," p. 3, No. 3.

12. Management of the Bum Steer – Jay and Sue Wilson and Stewart and Mateka – knew the location and coverage of the video cameras. Other employees might have been able to reason out the approximate scope of coverage of at least some of the cameras from their locations, and also from viewing some of the security videos (as they occasionally were asked to do by management). Management changed the coverages periodically.

13. The Bum Steer's employment manual includes the following harassment policies:

> 4.7 Harassment Policy. The Bum Steer does not tolerate workplace harassment. Workplace harassment can take many forms. It may be, but is not limited to, words, signs, offensive jokes, cartoons, pictures, posters, e-mail jokes or statements, pranks, intimidation, physical assaults or contact, or violence.
>
> 4.8 Sexual Harassment Policy. The Bum Steer does not tolerate sexual harassment. Sexual harassment may include unwelcome sexual advances, requests for sexual favors, or other unwelcome verbal or physical contact of a sexual nature when such conduct creates an offensive, hostile, and intimidating working environment and prevents an individual from effectively performing the duties of their position. Employees need to notify management verbally and written of any offence *[sic]* so that management can handle appropriately.

14. In the bar Jay Wilson often described himself as "rude, crude, and socially unacceptable," and often used the phrase "make my sticker peck out" or "makes my

sticker peck out." FPO, "IV. Uncontested Facts," p. 2, No. 4. He would describe himself as "rude, crude, and socially unacceptable" in the presence of customers, employees or both, male and/or female. In the bar, he would often respond to something a woman had said or had done by saying to her (in the hearing of anyone present), "Don't do that, you want to make [or, "you might make"] my sticker peck out?" The clear meaning of this "play on words" is, "Doing that might arouse me." The point of the statement appears to be the suggestion (whether joking or not) that Jay Wilson felt or perhaps hoped that the woman he addressed might be flirting with him or otherwise behaving in a way that seemed to him to be designed to give him an erection.

15. Substantial and credible evidence of record established that Jay Wilson made his comments in the bar about making "my sticker peck out": (1) to one or more female customers or in her/their presence; (2) to one or more female employees or in her/their presence, and (3) to or in the presence of mixed groups of one or more female customers and one or more female employees.

16. The substantial and credible evidence proved that the presence of male customers and/or other members of management made no difference to Jay Wilson's "rude, crude and socially unacceptable" and "sticker peck out" announcements.

Stover's Hire and Job Duties, and Initial Contacts with Jay Wilson at Work

17. In December 2011, claimant Lyndsay Stover was enrolled in her second year of the graduate anthropology program at The University of Montana. She planned to graduate with her master's degree in May 2012. FPO, "IV. Uncontested Facts," p. 1, No. 1. Stover was 28 years old when the Bum Steer hired her.

18. The Bum Steer hired Stover as a bartender, starting December 11, 2011. FPO, "IV. Uncontested Facts," p. 1, No. 1. Throughout Stover's employment at the Bum Steer, she considered Jay Wilson, Sue Wilson and Stewart as the three persons who supervised her. Jay Wilson had supervisory authority over Stover when he was present, particularly when neither Stewart nor Sue Wilson was also present. In supervising Stover, all three people acted on behalf of the corporation and exercised its authority. Terry Mateka was slightly involved, once, in disciplining Stover.

19. Stover had been at the Bum Steer before she applied for work there. She and her roommate had been customers there perhaps once a week, when their schoolwork was current and they had nothing else to do. Stover had not had "much contact" with Jay Wilson before she applied for the job, and had not heard him make comments about her appearance or comments with sexual content before she began working there.

20. When hired, Stover signed an acknowledgment that there was a 90-day probationary period. She received a short-sleeved t-shirt with the Bum Steer logo embroidered above the pocket, which she could wear at work. Bartenders could wear either the Bum Steer logo bearing shirts and tee-shirts that were available or their own clothes. Stover typically wore her own clothes. She was initially assigned to work primarily night shifts.

21. When the Bum Steer hired Stover, management knew that she did not have any bartending experience. FPO, "IV. Uncontested Facts," p. 2, No. 5.

22. Except for any overlap between the end of the day bartender's shift and the beginning of the night bartender's shift, there was typically one bartender on duty at the Bum Steer. On particularly busy nights, management might sometimes have a second employee assigned to work a "liquor store shift,"[2] which could entail other duties as needed. Sometimes one or both Wilsons would also work during particularly busy times.

23. The bartender's responsibilities include serving customers both in the bar and in the casino, cleaning up tables in the bar and the smoking room, cleaning up gaming machines in the casino, restocking supplies, serving food from the kitchen to customers, and serving customers in the attached liquor store. When the bartender came to work, she was given a "till" (cash for the till, apparently in a bag or money pouch rather than a removable till drawer), with a form on which the bartender would count the money in the "till" and verify the total at the start of her shift. This form was called, according to Stewart, a "till bag" and he agreed it was a "till receipt." Although the exact appearance of the till receipts changed slightly during Stover's employment, as can be seen by comparing the photocopies of the till receipts in evidence, the general content was the same.

24. At the end of her shift, a bartender did not count and verify the total, fill in the rest of the till receipt or note any discrepancies. At the end of her shift, she would put her till receipt and all the money back into the bag or money pouch, place the bag or money pouch (with uncounted money and till receipt) in the safe and lock the safe. All the bartenders had keys to the safe, to use at the beginning and end of their individual shifts.

25. During Stover's employment, Sue Wilson, Jay Wilson and Russell Stewart counted the money and completed the till receipts. The first count of the money was done by whichever of the three was responsible for "closing" – being present in the bar when the bartender on the night shift locked her bar or money pouch in the safe

---

[2] Stover was assigned a liquor store shift on December 31, 2011. Finding No. 29(A), p. 8..

and finished the nightly closing routine or else being first in the morning to go into the office and complete any part of the nightly management work not done the night before, as part of opening. Counting the tills was also called "Doing Bank." Counting all the tills for the day, before or after the closing was finished or at opening the next morning, was an important part of management "closing" responsibilities. One of the other two management persons who counted tills might be asked to recount a till, particularly if there was a large discrepancy, or if the closer couldn't figure out what had happened to create discrepancy. Small discrepancies were not uncommon, often from extraneous causes, such as a roll of quarters being one quarter short. Management's general rule was that any discrepancy of approximately $8.00 or more was problematic, and any problematic shortage would generally result in discipline, with some management discretion. Sue Wilson had the final word on whether a bartender would receive discipline.

26. Sue Wilson, Jay Wilson and Stewart each had access to the safe, and to tills and till receipts, whenever they were in the office. Actually, any bartender in the office had access to the safe, too, having a key, but an off-duty bartender in the safe at any time other than just before her shift to get and count her till or at the end of her shift to deposit her till and till receipt would have been an anomaly for management to question. The Wilsons and Stewart also had access to the till in the cash register when any of them went behind the bar during a bartender's shift. Anyone else behind the bar during the shift also would have access to the till of the current bartender for that shift, but each of the individual bartenders tried to keep others from getting behind "her" bar when on-duty with her till open in the cash register.

27. Jay Wilson or Sue Wilson sometimes did pitch in and handle some bar business, including working behind the bar.

28. The credible evidence of record established that Jay Wilson was frequently in the business premises when Stover was on shift. His regular duties in the morning assured he would be present for parts of the day shift, no matter who worked as bartender, and he was present during at least some portions of many of Stover's night shifts. Often when he was in the business premises during night shifts Stover was working, neither Sue Wilson nor Stewart was present.

Stover's Job Performance and Jay Wilson's Conduct, Part I

29. Two hand-written sheets (Exhibit 5, pp. 3-4[3]) summarize every shift that Stover worked and/or missed, December 2011 through April 2012, during her

[3] Page numbers in exhibits are actually Bates Numbers, so "pp. 3-4" refers to the pages numbered BS 000003 and BS 000004.

employment. For purposes of completeness in discussing her problems at work, with performance and with Jay Wilson, the dates she worked, the shifts she worked, and the actual hours she worked were as follows:

(A) Dec. 2011	Night Shifts:	11th - 6.75 hrs., 15th - 8.50 hrs., 17th - 8.50 hrs., 22nd - 7.25 hrs., 24th - 7.50 hrs., 25th - 7.25 hrs., 30th - 8.50 hrs.
	Liquor Store:	31st - 7.25 hrs.
(B) Jan. 2012	Night Shifts:	1st - 7.25 hrs., 7th - 8.50 hrs., 14th - 8.25 hrs., 15th - 8.25 hrs., 22nd - 7.50 hrs., 29th - 6.00 hrs.
(C) Feb. 2012	Day Shifts:	3rd - 6.00 hrs., 4th - 6.00 hrs., 7th - 6.00 hrs., 15th - 6.00 hrs., 17th - 6.25 hrs., 24th - 6.00 hrs., 25th - 6.25 hrs.
	Night Shifts:	2nd - 7.50 hrs., 10th - 7.25 hrs., 12th - 6.50 hrs.*, 18th - 10.50 hrs.
	Liquor Store:	1st - 3.75 hrs.

* Listed in Exhibit 5 as a day shift but actually a night shift (*see*, Finding No. 97, p. 25).

(D) Mar. 2012	Day Shifts:	2nd - 6.00, 3rd - 6.50 hrs., 5th - 6.00 hrs., 9th - 6.00 hrs,, 16th - 6.00 hrs., 17th - 6.25 hrs., 23rd - 7.25 hrs., 30th - 6.00 hrs.
(E) Apr. 2012	90 Day Rev.:	4th - 2.00 hrs.
	Day Shifts:	13th - 6.00 hrs., 21st - 6.25 hrs., 22nd & 23rd - Called off sick
	Night Shifts:	9th - 4 hrs., 15th - 8.25 hrs., 17th - 8.5 hrs.

30. On her first day of work, December 11, 2011, Stover was told by Jay Wilson to show more cleavage, because "tits equal tips." Stover had some initial difficulties counting change appropriately. On her initial shift, on December 11, 2011, her till was short $14.20. Stover worked 6.75 hours. Stewart closed the bar. No discipline was imposed on Stover for the till shortage.

31. On her second shift, on December 15, 2011, she was wearing a lower cut shirt, and Jay Wilson said to her, "I see that you took my advice, you know. Your tits look great in that top." Transcript of Hearing, Volume II, page 417, lines 12 through 17 [hereafter references to the Transcript will be by volume number, page number and inclusive line references, i.e., Vol. II, 417:12-17]. Stover worked 8.5 hours. Her till was short $3.75. Stewart again closed, and provided further training regarding counting change and general till management.

32. On December 17, 2011, Stover worked her third shift as a bartender. Exhibit 5, p. 5. Stover worked 8.50 hours, her till was short $18.50, and once again Stewart closed and attempted to train Stover regarding handling money.[4] No discipline was imposed for this shortage.

33. During either her December 15 or December 17 shift, Jay Wilson said to her "something along the lines of I just want to play with your nipples and play with

[4] The till receipts for the dates referenced in this finding are in Exhibit 5.

your tits and that kind of stuff." Vol. II, 417:18-25. After he would make comments about her breasts, Jay Wilson would often say, "I'm rude, crude and socially unacceptable and I know you know that." Vol. II, 417:23 - 418:4.

34. Stover was uncomfortable with Jay Wilson's comments to her, and tried to discourage him. "[H]e would ask me if he made me uncomfortable just to let him know. So I always told him that he made me uncomfortable. I told him I have a boyfriend. I would tell him, I don't like this. I don't know why you are doing this." Vol. II, 418:8-13.

35. On what appears to be Stover's application for employment with the Bum Steer, signed on November 17, 2011, below her signature, in what appears to be someone else's handwriting, is a note that Stover would have a "class" (apparently training for her new job) on December 19, 2011. Testimony at hearing indicated that she did not participate in that training, apparently because she was drinking, although she may have been present for it.

36. Embarking upon her bartender job at the Bum Steer with no experience and very little training by this employer before she started, Stover had to learn the job "on the job," with a primary supervisor (Stewart) whose experience and expertise at bartending and at training new bartenders was not proved, and remains uncertain. Sue Wilson testified that Stewart had been "trained" and then trained new bartenders, which appeared to mean that she and her husband had trained Stewart. Sue Wilson also credibly testified that three new bartenders – Stover, Linsey Langlois and Caitlin Hoover – were hired and trained at about the same time, and that all three had little or no experience. Vol. III, 573:13-17. From the evidence, all three were trained by the same team – the Wilsons, Stewart and Jan Hubbell. Hoover quit in April 2012 for a outdoor job in landscaping. Stover ended her employment on May 1, 2012. Langlois was fired in early June 2012.

37. On Stover's fourth working day at the Bum Steer, December 22, 2011, management brought in Jan Hubbell to work with her and "retrain" her. Hubbell had tended bar at the Bum Steer for 24 years and, after retiring in February 2011, had continued to work some shifts and to train new employees. Hubbell described Stover's problems on December 22, 2011 as involving counting change (together with other till problems), not meeting and greeting customers when they arrived at the bar and a lack of "room awareness." Stover worked 7.25 hours. On December 22, 2011 with Hubbell present, the till was short $0.25 (Exhibit 5, p. 9). Hubbell closed.

38. On December 22, 2011 Stover also received training on how to verify the validity of gaming tickets. The December 22, 2011, training verification that Stover

signed does not actually specify that a gaming ticket can only be cashed on the date received, but that is the usual practice.

39. At the Bum Steer gaming tickets were cashed on the date printed and were refused thereafter. There was some general testimony that this practice was more honored in the breach than in the observance. The training verification Stover signed on December 22, 2011, acknowledged that cashing a forged ticket could lead to immediate dismissal without further notice, but it did not mention an out-of-date ticket. Nonetheless, only cashing gaming tickets on the date printed reasonably should have been common knowledge for all employees, and was at least suggestive of the possibility that cashing an out-of-date gaming ticket might trigger immediate dismissal without further notice.

40. On December 24, 2011, Stover worked her fifth shift. During that shift, Jay Wilson approached Stover in the smoking lounge and told her he found her very attractive and asked if she liked older men. Vol. II, 419:6-12.[5]

41. Uncomfortable and unsure how to respond to this statement by her boss, Stover nervously laughed and said "Okay, that's enough." Jay Wilson replied "I know, I know, I'm rude, crude, and socially unacceptable, but I wanted to let you know." Stover was sent home "early" (1:30 a.m.) on December 24, 2011. Sue and Jay Wilson closed and completed the till receipt. Stover's till was short $3.00 (Exhibit 5, p. 11).

42. On December 25, 2011, Stover's sixth shift, with Stewart as the closer, and with less than $191 in sales, Stover's till was short $4.25 (Exhibit 5, p. 13).

First Discipline of Stover by the Bum Steer

43. On Friday, December 30, 2011, Stover again worked the night shift, her seventh shift. When she counted her till at the beginning of her shift, it was $100.00 short (her note indicates there was "$500 in fives, not $600"). She adjusted the total after that initial count. Exhibit 5, p. 14. Her till was $12.00 short when counted after she had turned it in. ***Id.*** Had Stover missed the shortage during her initial count, she would have been $112.00 short. Stewart closed.

44. On December 31, 2011, Stewart gave Stover her first disciplinary notice, on the employer's "Disciplinary Warning" form (Exhibit 6, p. 81), for a till short $12.00 on December 30, 2011. Stewart and Stover both signed this notice. FPO,

---

[5] In answering questions about the December 24, 2011, incident, Stover testified beyond the scope of the questions about other incidents, without identification of the dates of those incidents. ***E.g.***, Vol. II, 418:19 - 419:5; 419:12 [starting with "And then he would"] - 420:17; ***see also***, Vol. II, 427:6 - 429:5. No findings are based on testimony of incidents without sufficient foundation.

"IV. Uncontested Facts," p. 2, No. 6. The action checked on the notice was "First warning – Verbal." The next step in the progressive disciplinary policy of the Bum Steer was "Second warning – Written." There were no written comments in "Supervisor Comments" or "Employee Comments."

45. Several times during her testimony, Stover credibly stated that Jay Wilson's sexual harassment left her constantly uneasy and upset, making it very difficult to concentrate on money handling at work, because whether he was present or not, her concern that he might be about to show up without warning kept her off-balance all the time. There is no evidence that Stover brought this up at the time Stewart gave her first disciplinary notice.

46. Sue Wilson testified at hearing that she was present for each of the disciplinary notices Stewart gave to Stover, although Sue Wilson did not sign them. This testimony is not consistent with that of Stewart and Stover about these disciplinary notices. If Sue Wilson was present when Stewart gave Stover this first disciplinary notice, it increases the likelihood that the notice process occurred earlier in the day than Stover's liquor store shift (scheduled to start at 3:00 p.m., Exhibit 5, p. 12).

Stover's Job Performance and Jay Wilson's Conduct, Part II

47. On December 31, 2011, New Year's Eve, commencing at 3:00 p.m., Stover worked a liquor store shift. She wore a dress that is shown in the photograph and enlarged section of that photograph which together are Exhibit 103. Jay Wilson approached Stover in the liquor store and told her he would like to see what was underneath her dress, and said that he wanted her to bend over a little further so that he could see her tits. Stover also testified that she believed that was the night that Jay Wilson told her he wanted to play with her nipples and asked her how big they were. She credibly testified that when she reminded him that she had a boyfriend, he reiterated that he was "rude, crude and socially unacceptable" and he asserted in very crude and socially quite unacceptable terms that he (Jay Wilson) "bet" that he was better at oral sex than Stover's boyfriend. Vol. II, 420:18 - 422:5.

48. During the hearing, the respondents offered evidence that Stover could have worn Bum Steer t-shirts, but chose to wear much more revealing outfits of her own. This "scanty outfit" testimony came from both of the Wilsons and from another bartender, Marcie Paske (Vol. IV, 684:12-18), as well as from a friend of the Wilson's, Tracy Perry. They all seemed to agree that Stover's choices of clothing were often too revealing for "bar culture." The dress she wore for her shift in the liquor store on New Year's Eve 2011 was specifically cited by both Wilsons and Paske as an extreme example of her inappropriate attire.

49. Jan Hubbell worked behind the bar on New Years' Eve 2011. With permission from the Wilsons, she sent Stover "home early" (10:15 p.m.), and there is a note in the time sheet (Exhibit 5, p. 12) that Stover "sat with friends all shift. Didn't work." No till from New Year's Eve is in evidence. Jan Hubbell testified that she came to work at 6:00 p.m. and that Stover was working at that time. Vol. IV, 717:19-21. At some point "as the night progressed," some friends of Stover's came into the bar, and Stover then stayed with that group, ignoring the casino and the liquor store. Hubbell could not state what time that occurred. She saw Stover have one drink while she was still "on shift" (which was permitted during the last hour of a shift), and eventually sent Stover home because "We were not that busy and I felt she wasn't doing her job. She was hanging out with this bunch rather than paying attention." Vol. IV, 717:22 - 718:23.

50. While testifying about Stover's conduct on New Year's Eve, Hubbell did not mention what she was wearing on December 31, 2011. Eventually, she was asked generally about Stover's choice of attire for work, and responded generally that Stover chose clothing such that "there was too much showing" for the "older customers," that Stover showed "too much breast" and "too much thigh." Hubbell elaborated, "I'm sorry, I don't want my husband standing there going like this at, you know, whatever. We had couples coming in." Vol. IV, 722:21 - 723:12. Shown Exhibit 103 (Stover on New Year's Eve, in a short dress) later in her testimony, she called Stover's dress "similar" to the "too much showing" choices about which she had testified earlier. Vol. IV, 728: 21 - 729:20.

51. The dress that Stover wore on December 31, 2011, had a short hem and was low cut at the top. It did not appear indecent. It did not appear too revealing for a "bar culture." Another employee, Caitlin Hoover, was present in the bar on New Year's Eve 2011, and saw the dress. Asked to describe it, she testified, "You know, I don't remember exactly. I'm pretty sure it was just a black cocktail dress. I don't think that it was overly showy. . . . . It wasn't anything that was, you know, scandalous looking or anything like that, though." Vol. II, 276:2-11.[6] The Bum Steer never disciplined Stover based upon her choice of attire. The evidence about the allegedly extremely revealing outfits that Stover allegedly wore to work was not credible.

---

[6] Hoover's testimony and Exhibit 103 proved the exaggerations in respondents' evidence of how revealing Stover's dress was. Jay Wilson's signed statement to HRB, July 29, 2012, Exhibit 17, pp. 43-49, at the top of p. 45 contained the worst exaggerations of all: "On New Year's Eve Ms. Stover . . . came into work with a dress so short she couldn't bend over, and the top cut so low her areolas were ready to be exposed. Her anus would show if she bent over. . . . . Sue and I almost sent her home to change but we both advised her to be careful if she bent over."

52. Stover was not disciplined for any of her conduct on New Year's Eve at the Bum Steer.

53. On New Year's Eve, 2011, Stover was given a disciplinary notice for her $12.00 till shortage on December 30, 2011. During her shift on New Year's Eve she was subjected by one of her supervisors, the president of the corporation that employed her, to verbal sexual harassment at work, which included descriptions of sexual acts he wanted to perform upon her and a graphic and extremely crude assertion that he was far more gifted at performing oral sex than her boy friend. At some point that evening, she was photographed dancing with her harasser. Although she was complimented by her supervisors on her outfit, it was also a topic for sexual harassment (Jay Wilson saying he wanted to see more, and then wanted to make physical contact with and play with her breasts). After she spent time at a table of her friends, she was sent home early because she was not working.

The Men's Bathroom Incident

54. Stover worked the night shift on January 1, 2012, from 5:45 p.m. to 1:30 a.m. Exhibit 5, p. 12. Stewart closed. Stover's January 1, 2012, till was $0.15 short. Exhibit 5, p. 15.

55. In early January, Marcie Paske, a bartender at the Bum Steer, approached Sue Wilson with a report of something she had been told while on duty bartending in the Bum Steer a day or two before. Paske told Sue Wilson that she was approached by a male customer, who did not want to be identified:

> A. I was actually on shift and I was in the casino. And a customer had come out of the bathroom area – I don't believe he actually went into the bathroom – but out of the bathroom area over by the pool table. And he came to me and said, I can't believe – I'm so embarrassed. I can't believe what I just saw in the bathroom. And I said, what? And he goes, Lyndsay, Lyndsay is in there giving some guy a blow job.

Vol. IV, 679:6-15.

56. The male customer's name has never been provided by respondents. Respondents did not call the male customer to testify at hearing. In her testimony at hearing, Paske indicated that this may have happened in April 2012, but then added that she did not remember when it occurred. Vol. IV, 678:21-23. Paske testified that a couple days or perhaps a week after the male customer told her this, she reported what she had heard to Sue Wilson. Vol. IV, 679:24 - 680:1. Thus, it is

more likely than not that Paske told Sue Wilson about the incident in early January 2012.

57. Sue Wilson testified at various times that she had complete authority over hiring and disciplining employees, and that she discussed everything with her husband even though she did not share her decision-making power with him. Although there was no direct testimony about whether Jay Wilson found out about the men's bathroom incident, Sue Wilson's testimony about sharing information with her husband makes it more likely than not that he learned of the incident within a day or two of the time she learned of it.

58. On July 28, 2012, Paske and Sue Wilson again spoke about the incident. Stover had quit her job on May 1, 2012. Jay and Sue Wilson had received notice of Stover's Human Rights complaint on May 1, 2012 (***see*** Finding No. 141, p. 33). After the July conversation between Paske and Sue Wilson about the incident, Sue Wilson typed a statement about the incident, signed by Paske on July 30, 2012. Exhibit 17, p. 51. The typed signed statement indicated that the customer had approached Paske "around the 1st part of January 2012," and "told me what he had just seen in the men's bathroom." ***Id.*** Then it says, "He walked into the bathroom and saw Lyndsay Stover performing oral sex on another person." Next, it says, "The customer, being embarrassed, said to me, "Maybe they should lock the door on the men's room if she is going to do that." Paske asked, "What is she doing?" The customer reportedly responded, "Giving some guy a blow job." ***Id.*** According to the statement, Paske told Sue Wilson about the customer's report of what he had seen within days after the customer told her. Thus, more likely than not, Paske and Sue Wilson, when preparing the statement signed by Paske, were accurate identifying the time (first part of January 2012) that was assigned to the alleged incident when it was first reported to management.

59. The Bum Steer never disciplined Stover based upon what Paske told Sue Wilson that a male customer said about what Stover was doing in the men's bathroom with some guy.

60. Sue Wilson, at some point, wrote a note about what Paske told her. It appears in Exhibit 6, p. 54. Exhibit 6, pages 53-54 (undated). The handwriting appears to be on the back (p. 54) of a form entitled "Employee Consultation (p. 53). The difference in the darkness of the ink of some of handwriting, on the photocopy of the original which is in evidence, suggests that Sue Wilson wrote the note, then later modified it. The only reference to a date appears to be part of the modification. The original text appears to have said, "Talked about rumor with customer and having sexual contact with man in restroom when customer walked in on them." The modifications added words (in brackets) and crossed out other words (strike lines through them), so that it read. "Talked [to Ms. Stover on 01-15-12] about

[complaint] rumor with customer [customer of hers going to bathroom told Mouse ~~told us~~ and Mouse told us.] and ~~having sexual contact~~ [giving fellatio] with man in restroom when customer walked in on them. [(~~Blow Job~~) Fellatio]".

61. The front side of that document (p. 53 of Exhibit 6) has what appears to be a partial date ("13" and "13th"). "Nature of problem" is described as "Employee called to have talk about writeup" [new line begins under "about"] "90 day eval." The rest of the handwriting on that page comes at the bottom under "Employee statement." The very bottom of the front page appears to be a handwritten note that carries over to the back side (p. 54), although it is hard to tell. The front side concludes, "We had had *[sic]* many conversations with her in the beginning of her employ about having a new boyfriend & her not able to concentrate [the word "concentrate" is underlined twice] at all with her job every time he walked into the building. Customers were complaining about her not serving them & not counting money back to them correctly. She could" [end of p. 53] [beginning of p. 54] "[cut-off word, ending in "elf"] her new boyfriend was not present she did much better. We never banned her new boyfriend but she was counseled verbally as to our request that boyfriends, not being able to perform her job would affect her job." The document appears to have been modified one or more times after it was originally created. No reliable dating for any particular writing on this document can be made. Vol. III, 632:15 - 633:24.

62. On the other hand, the parties stipulated that on January 15, 2012, Sue Wilson spoke with Stover about another employee reporting that a customer had said that he saw Stover performing oral sex on "a guy" in the men's bathroom, and that Sue Wilson kept notes of the conversation, but took no disciplinary action. FPO, "IV. Uncontested Facts," pp. 2, No. 7. The Hearing Officer cannot ignore or discard a pertinent uncontested fact, although the sequence of events on January 15, 2012, left little time for Sue Wilson and Stover to have a conversation in the office while they were both on the premises. The parties agreed to this date for this conversation, even though evidence about exactly when that day it happened is lacking, and even though the only notes by Sue Wilson about the conversation that were referenced during the hearing are on Exhibit 6, p. 54, which references January 15, but is undated.

63. During her hearing testimony, Sue Wilson enlarged the scope of this incident, in the context of problems with Stover's performance as an employee:

> Q. And she [Stover] was also, as I recall, giving blow jobs to customers in the bathroom?
>
> A. True.

Vol. I, 141:11-13.

64. Sue Wilson was also questioned at hearing about her deposition testimony.

Q. (By Mr. Terrazas) We started talking about your allegation that she was giving blow jobs to men in the bathrooms, right?
A. Correct.
Q. And then I asked you at line 7, did you see it on tape? And your answer was what?
A. "Did you see it on tape?" "Yes."
Q. I said, "you did?" And what was your response?
A. "I saw her walk into the bathroom." What about it?
Q But that wasn't all of your answer.
A. Did I save it? No. Did I write her up for it? No.
Q. Now, wait a second. The rest of your answer was "bathrooms are illegal to have cameras in there. But you can have them in the hallway going into the bathroom. So she said, no, she didn't want to see it." I asked you, "did you save it?" And what was your response?
A. No.
Q. And then I asked you, "why not?" What was your response to that? Can you please read your response?
A. It says that I couldn't make copies of it at the time. It had some malfunctions with the taping part of it.
Q. Actually, what your response was –
A. During that time it did have malfunctions at times. And I didn't make a copy of it because I didn't write her up for it. I didn't attempt to make a copy of it because I didn't write her up for it. I just counseled her on not doing that while she's at work.
Q. Excuse me, ma'am. Wasn't your response because our – "nobody knew it at the time, but our surveillance system wouldn't make copies at the time"?
A. Correct.
Q. "It had some malfunctions with the taping part of it"?
A. Right. . . . .

Vol. I, 146:18 - 148:11.

65. The most likely time for Sue Wilson to check the security tapes for anything confirming the incident would have been in mid-January 2012, after she

heard about it from Paske. Her responses at the hearing about not writing Stover up and therefore not copying the tape would also make sense if she had viewed the video then. That was when, according to some of her testimony, Sue Wilson decided not to discipline Stover for the incident. This also appears more consistent with Uncontested Fact No. 7, because it would mean that Sue Wilson looked at the security tapes before talking with Stover about the event in mid-January 2012.

66. But Sue Wilson gave other conflicting testimony at hearing, about why the pertinent security tape was not saved. She was asked if, during the time that Stover was working at the Bum Steer, the bar's security system would not save or make copies of particular recordings. Vol. I, p. 145:13-16. Sue Wilson replied as follows.

> A. Not the whole time she was working. It only happened once, but I can't remember the exact time. No, I do remember. It was when Linsey Langlois was fired and I couldn't burn a copy of one of the days that we had witnesses for allegations. But the second day I was able to.
> Q. For Linsey Langlois?
> A. Yes.

Vol. I, p. 145:17-25.

67. Linsey Langlois was fired on June 6, 2012. Vol. II, 365:12-13, a month after Stover ceased working at the bar. If the recording malfunction "only happened once," in the first week of June 2012, it wouldn't have mattered, because a security tape from January probably would have been reused by June and could not be saved. If Sue Wilson didn't save the security tape in January because she had decided not to discipline Stover, then why did she testify at hearing that a malfunction of the security system months later was the reason for not recording it? Her testimony was internally inconsistent.

68. Sue Wilson also told Langlois about the incident.

> Q. Did you ever hear a rumor about Lyndsay doing sexual favors in the bathroom at the Bum Steer?
> A. I was told that rumor from Sue.
> Q. What did Sue say to you?
> A. That while Marcie was working a shift Lyndsay was there, and that supposedly a customer saw Lyndsay go into the bathroom – and I don't even know how that transpired from her being in the bathroom to her giving blow jobs or hand jobs in the bathroom. But that's what Marcie and

the customer had discussed. And as far as Sue and Marcie discussed, and Marcie told it to me – or excuse me, Sue told it to me, saying, you know, just in case customers ask you so you know what's going on, and then told me that it's okay to prostitute, just not on the clock or while you're working there.

Q. And did a customer ever ask you about that?
A. Never.
Q. Anybody else ever ask you about that?
A. Sue was the only other person. I told Lyndsay about it when it happened.
Q. Right.
A. Other than that, nobody even asked me about it even.

Vol. II, 370:13 - 371:14. It was wildly inappropriate for Sue Wilson to share with another employee the hearsay accusation that Stover had engaged in this conduct.[7] In addition, Sue Wilson didn't just share the alleged incident with another employee, she made a further expansion of the meaning of the alleged incident, even beyond transforming that one single incident into multiple incidents. In sharing the alleged incident with another employee, Sue Wilson made some further assumptions about what the hearsay accusation meant – that it not only had happened more than the once involved in the hearsay accusation, but that the multiple incidents all involved sex for money transactions.

69. These expansions of the meaning of an event never proved on the record were neither justified nor explained in the evidence. The underlying information Sue Wilson received was Paske's report of hearing an unnamed male customer say he had just seen Stover giving a blow job to some guy in the men's bathroom. Sue Wilson may or may not have seen a security video that (according to her testimony) showed Stover "walking into the bathroom." This was a flimsy basis for Sue Wilson to agree under oath that Stover was giving "blow job*s* [plural]" in the men's room, which would require more than that one alleged instance. Vol. I, 141:11-13. This was an insufficient basis for Sue Wilson, in the course of inappropriately sharing information about the alleged incident with Langlois, to describe what Stover was allegedly doing

---

[7] Respondents asserted that Langlois was biased against them, and should not be believed, because they fired her and successfully opposed her Unemployment Insurance claim. The best evidence of bad feelings between Langlois and the Wilsons was the Wilsons' "Notice of Trespass" letter, warning Langlois to stay off bar premises, three months after she was fired, with no evidence she had been on the premises after she was fired, except perhaps to pick up her check. The Wilsons seemed more hostile towards Langlois than she towards them.

as "to prostitute" which Sue Wilson indicated would be "okay" if it was not "on the clock" or "while . . . working there." Vol. II, 370:4-5.

Stover's Job Performance and Jay Wilson's Conduct, Part III

70. From the beginning of Stover's employment through her January 1, 2012, shift, Jay Wilson had not inappropriately touched her, although his verbal sexual harassment had steadily and alarmingly escalated.

71. On Saturday, January 7, 2012, Stover worked the night shift, starting at 5:45 p.m. and working until 2:15 a.m. Exhibit 5, p. 12. This was her first shift since January 1, 2012. Her till was $0.50 short. Stewart closed. Exhibit 5, p. 16.

72. During Stover's January 7, 2012, night shift ("early in January" and "maybe the first week in January" were her descriptions of the date at hearing), Jay Wilson snuck up behind Stover in the ice and dry storage area. When Stover bent over to collect ice, Jay Wilson reached his hand over her, inside her shirt, and pinched her breast. When she turned around, he forced his tongue in her mouth. Stover couldn't move backwards, so she pushed him away. Jay Wilson pushed forward and attempted to reach his hand inside the pants she was wearing, saying "You don't know how bad I want to lay you down and lick your pussy." Stover pushed back and said "What is your problem Jay? I have a boyfriend and you have a wife!" Jay Wilson apologized and said it would not happen again. Vol. II, 422:9 - 424:20.

73. At the end of that same shift, around 2:00 a.m., as Stover entered the restroom, Jay Wilson yelled "Don't lock the door!" Stover told him she was locking the door. Jay Wilson shouted, "Well then stick your fingers in your pussy and come back out and let me smell and lick them." Stover told him she was not going to do that and to knock it off. Vol. II, 424:21 - 425:17.

74. Jay Wilson's inappropriate and unwelcome sexual contacts and more outrageous comments to Stover on January 7, 2012, constituted another substantial escalation in the level of sexual harassment to which he was subjecting Stover.

75. Stover worked the night shift on Saturday, January 14, 2012, 5:45 p.m to 2:00 a.m. Stewart closed. Her till was $1.50 short (Exhibit 5, p. 18). She did not report Jay Wilson's harassment to Stewart.[8]

---

[8] The fact that Stewart "closed" did not mean he was present throughout the shift, nor that he was present until Stover completed her closing work and left. It only meant he was responsible for management closing tasks, largely "doing Bank." He may not even have been present to complain to.

Second Discipline of Stover by the Bum Steer

76. Stover worked the night shift on Sunday, January 15, 2012. Stewart closed. Her January 15 till was exactly correct (Exhibit 5, p. 19). Jan Hubbell testified that on the night of January 15, 2012, she found Stover in the smoking room kissing her boyfriend instead of paying attention to her job. Later, perhaps around 1:00 a.m., Sue and Jay Wilson came into the bar and Hubbell told Sue Wilson about Stover's behavior. Sue Wilson also served drinks to some customers unhappy about Stover's slow service. There is no credible evidence of how and when during this shift Sue Wilson and Stover met and discussed the men's bathroom incident, but the parties stipulated that such a meeting somehow did occur on this date.

77. On January 19, 2012, the Bum Steer issued Stover a disciplinary warning ("Second warning – Written") for kissing her boyfriend in the smoking room on January 15 and for cashing an out-of-date gaming ticket. FPO, "IV. Uncontested Facts," pp. 2, No. 8; Exhibit 6, p. 83. The disciplinary warning did not mention the men's bathroom incident. Stover was called in and met with Stewart and Sue Wilson on that date, and they gave her the written disciplinary warning. They counseled her on her work performance and told her she was too distracted when her boyfriend was in the bar while she worked, referring to the smoking room episode, when she was embracing and kissing her boyfriend instead of being present in the bar and paying attention to customers. Stewart and Sue Wilson counseled Stover on her work performance, telling her that her poor performance seemed to be because her boyfriend's presence while she was at work, and telling her that "he shouldn't come in during [her] shifts." Vol. II, 431:20 - 432:1.

78. Stover told them that she wanted to make a formal complaint, because she was worried about her boyfriend not being allowed in the bar when she was at work, that there were "extenuating circumstances" for her boyfriend to be in the bar when she was at work. Vol. II, 488:3-25. Sue Wilson and Stewart asked what the "underlying circumstances" were, but Stover was unwilling to talk to Sue Wilson about her husband's unwanted sexual comments and physical contacts. Afraid that she would not be believed, Stover said, "You know what, it's nothing," signed the write-up and left. Vol. II, 432:2-7.[9] On January 19, 2012, Sue Wilson decided not to discharge Stover immediately without further notice for her January 15, 2012,

[9] Uncontested Fact No. 9 in the Final Prehearing Order, p. 2, states: "On or about January 19, 2012 Stover told Sue Wilson and Stewart she wanted to make a formal complaint. When Sue Wilson asked Stover what the problem was, Stover said "never mind, it's nothing."

conduct, which it appears she could have done, simply for cashing the out-of-date gaming ticket.

79. Stewart did not observe Stover kissing her boyfriend in the smoking room on January 19, 2012. Stewart wrote and signed the disciplinary notice as Stover's supervisor, essentially at Sue Wilson's direction. Sue Wilson told Stewart that she had observed Stover, on the video recording from the camera in the smoking room, kissing her boyfriend in the smoking room. Stewart had no recollection of watching the video himself.

80. The next step in the progressive disciplinary policy of the Bum Steer, if something else justified further discipline, could have been either another "Second warning – Written" or, a more severe sanction if management deemed it appropriate. "Supervisor Comments" on the January 19, 2012, write-up stated that Stover "needs to pay attention to bar and not boyfriend" and that Stover "cashed out gaming ticket and didn't look for date on ticket." In "Employee Comments" Stover addressed only the second basis for the write-up, stating that she "didn't know that the gaming ticket needed to be cashed the same day it was printed." She made no written challenge to the first basis for the January 19, 2012, write-up, the report of her conduct in the smoking room with her boyfriend.

81. There was a further notation on the write-up, stating, "Note 12-22-11 signed class on gaming tickets, see gaming ticket 20 days old cashed." A photocopy of this gaming ticket appears in Exhibit 6, p. 87, and pp. 85-87. All three pages have additional notations regarding the January 15, 2012, ticket cashing. Obviously, the comments about this ticket cashing that appear on the bottom of Exhibit 6, p. 85, under the documentation on that same page of Stover's December 22, 2011, training, were written on or after January 15, 2012, and not on December 22, 2011. That training was simply presented at hearing as evidence that Stover had been trained to check the date on every ticket presented for cashing. The only incident of erroneous cashing of a gaming ticket by Stover that the respondents proved was the incident that occurred on January 15, 2012.

82. This incongruity of dates demonstrates that Sue Wilson added notes about a January 15, 2012, incident, to a document dated December 22, 2011, raising a question about whether she did the same with other documents in evidence. This question is not necessarily a question of dishonesty, but certainly is a question about record keeping style. Without any intent to falsify anything, a record keeper can confuse everything by adding notes at later dates to existing documents, as clarifications or subsequent thoughts about the events originally documented. This generates uncertainty about what was written when, which in turn clouds what the documents report about the events that occurred on or before the date of creation of

the documents in their original forms, since the documents now include information about events that occurred after the date of creation of the documents in their original form.

83. In his testimony, Stewart admitted that Stover had approached him in January 2012 and complained to him that Jay Wilson had made sexual advances towards her. Vol. I, 12:11-14. In response to questions about when Stover made that complaint, what specific complaints she made and what he said to her, Stewart testified that he did not recall. Vol. I, 12:16-17; 13:2-14. He agreed this complaint was made by Stover while she and Stewart were in the bar. Vol. I, 12:23 - 13:1. Stewart denied telling Jay Wilson about this complaint. Vol. I, 17:17-19.

84. On January 19, 2012, after leaving the office area where the "Second warning – Written" had just been delivered to her, Stover told Stewart about some of the unwanted physical contact as well as the explicit language and propositions that Jay Wilson had inflicted upon her. She credibly testified that:

> But as Russ was leaving with me and as we were walking out the door, I kind of pulled Russ aside and told him – I said, things are happening, Russ. Jay has been touching me. He's put his hands between my legs. He accosted me at the ice machine. There's been more situations.
> And I just -- and he said, you know, Lynds, we've had these problems before and it's, like, just stay out of the office. Stay out of the ice room. Avoid him. And if you want -- now that Devon isn't going to be coming in, if you want I would stay with you. And I said, you know, that would be really nice.
> Q. Why didn't you report this to Sue?
> A. Because Sue is his wife and I didn't know how to even begin to tell her. I didn't think she would believe me and I was scared for my job, too. I mean, telling -- if she doesn't believe me what he did -- she could do anything she wanted.
> Q. Why didn't you think she would believe you?
> A. Because it's her husband. I don't – and I mean, I just didn't think she would. I just thought it would be -- I don't know. I just didn't feel right telling her, pretty much.
> Q. You felt safer talking to Russ; is that right?
> A. Yes. I felt a lot safer talking to Russ.

Vol. II, 432:8 - 433:12.

85. After Stover told him about of some Jay Wilson's words and acts towards her, Stewart talked to another bartender, Linsey Langlois, about Stover's reports of sexual harassment, and told her that Jay Wilson "has had this problem in the past." Vol. II, 351:23 - 352:1. He told Langlois that Stover should stay out of the security camera "blind spots" to avoid Jay Wilson's attentions, which was impossible, since the spots the cameras did not cover typically included the office, the beer room, the ice machine and the kitchen, places bartenders had to go to perform their job duties. Vol. II, 352:1-19. Stewart denied ever having this conversation with Langlois.

86. After her discussion with Stewart, in which he offered to stay with her for closings when Jay Wilson was around, Stover could only recall Stewart staying with her one night at work. Stewart testified that he might have stayed with Stover during her closing duties more than once.

87. Stover had been relying upon her boyfriend for protection and safety from Jay Wilson's sexual harassment, and now sexual contacts, with her. Sue Wilson and Stewart had now taken that source of protection and safety away from her. Her complaints to Stewart had resulted in nothing. Now, her direct plea in response to his offer to stay while she closed had likewise resulted in, essentially, nothing.

Stover's Job Performance and Jay Wilson's Conduct, Part IV

88. As a result of the January 19 counseling and disciplinary warning, Stover's boyfriend no longer came into the bar while Stover worked. Vol. IV, 751:6-9. During Stover's next shift after she reported some of Jay Wilson's conduct to Stewart, Jay Wilson confronted her, told her he knew she wanted to file a complaint, and asked if it had anything to do with him. Stover was alarmed and afraid of losing her job, so she replied "No." Vol. II, 434:4-20. The only two shifts she worked in January after the disciplinary warning of January 19, 2012, were the night shifts for Sunday night, January 22, and Sunday night, January 29. Thus, this confrontation occurred on January 22, 2012, which was Stover's next shift after reporting some of Jay Wilson's conduct to Stewart.

89. On January 22, 2012, Stover's till was exactly correct (Exhibit 5, p. 21). Stewart closed.

90. A "little bit after that, a little bit later in January" – later than Jay Wilson confronting her about her complaint, according to the sequence of the questions [Vol. II, 434:4 - 435:8] – Jay Wilson "snuck up" behind Stover when she walked out of the office and through the kitchen, reached his hand between her legs, ran his hand up her leg and over her buttocks. Stover told him to stop and reminded him that she had a boyfriend. Vol. II, 435:9 - 436:13. Later that same shift, Jay Wilson followed Stover into the ice storage area, spun her around, reached inside her shirt, exposed her breast and placed his mouth on it. Stover pushed him away and told

him she did not like what he was doing. Jay Wilson said "Oh yes you do." She said "No I don't, please leave me the fuck alone," adjusted her shirt, and walked away. Vol. II, 436:14 - 437:25. More likely than not, this occurred during Stover's night shift on January 29, 2012. There is no evidence that Stover reported any incidents to Stewart on that night.

91. For Stover's January 29, 2012, shift, her till receipt indicated "AM," but her time sheet indicated that she worked from 5:45 to 11:45 that Sunday night (Exhibit 5, p. 20). The first of the two summary sheets prepared by the respondents indicated that every shift Stover worked in January 2012 was a night shift. Exhibit 5, p. 3. More likely than not, she worked the night shift on January 29, 2012. Her till was long $3.25 (Exhibit 5, p. 22). Stewart closed.

92. On February 1, 2012, Stover worked a liquor store shift of less than four hours. No information about her performance or any problems during that shift is in the record. Her February 2, 2012, night shift till was short $2.50 (Exhibit 5, p. 23). Stewart closed.

93. Stover credibly testified about two additional encounters with Jay Wilson in the smoking room in February, but was unable to date them with much certainty, testifying that she was not keeping a diary of all the encounters with Jay Wilson, and that what informal notes she did take (on napkins) would often not include dates. Vol. II, 438:1 - 439:13. Because these encounters occurred in the smoking room, it is more likely than not that these encounters occurred during night shifts, not day shifts. The first encounter probably occurred "around February 4," Vol. II, 438:1-6 and 439:14 - 440:23. While in the smoking room, Jay Wilson told Stover "I want to stick my tongue in your pussy and make you cum all over my face." Stover tried to discourage him. This encounter, more likely than not occurred, on February 2, the only night shift Stover worked after January 29, 2012, and before February 10, 2012. There is no evidence that Stover reported Jay Wilson's conduct to Stewart.

94. Stover worked day shifts on February 3 and 4, 2012. Exhibit 5, p. 20. Her till receipt for February 3 appears to have initially shown a shortage of $8.75, but that number was circled and crossed out and $2.37 was written beside it. Exhibit 5, p. 24. Her February 4, 2012, till receipt indicates an extra $1.25 was in the till. Exhibit 5, p. 25.

95. Stover's February 7, 2012, day shift till was correct. Exhibit 5, p. 27.

96. Stover's February 10, 2012, night shift till was short $1.75. Exhibit 5, p. 28. Stewart closed. During this shift the second encounter referenced in Finding No. 93 might have happened, but Stover's testimony did not tie it to this or any other date with sufficient clarity to establish a foundation for finding that it occurred.

97. Stover's February 12, 2012, shift is reported on the summary sheets as a day shift. Exhibit 5, p. 4. On Stover's time sheet, her work that day is listed as "AM," but her start time is listed as "5:45," her end time is listed as "12:15 am" (with "12:10 am" with the "10" crossed out and a "15 written just above behind the "am"), and Stewart is identified as the closer. Exhibit 5, p. 26. Clearly, this was a night shift. Her till was $1.50 long (Exhibit 5, p. 29).

98. Stover's February 15, 2012, day shift till was $0.50 short (Exhibit 5, page located at the position in the exhibit for page 30, but bearing no Bates number).

99. Stover's February 17, 2012, day shift till was long $1.00. Exhibit 5, p. 31. There is no indication of who counted her till.

100. For a period of a week or two, in February or March 2012, Sue Wilson was out of town. Vol. I, 181:4-9 and Vol. III, 643:10-18. Over approximately the same time, Jay Wilson propositioned Stover repeatedly. He asked her to have sexual intercourse with him, asked her to come to his house (in the same building as the bar), and asked if she was using birth control. He stated he wanted "just . . . to fuck and that's is all it would be," and that it would be their secret. Vol. II, 441:20 - 442:6.

101. Stover worked the night shift February 18, 2012. Jay Wilson came into the bar at some point, and remained as Stover was closing. She credibly testified:

> . . . . I was closing down the bar and I had everything done, all the chairs were up and everything. All my closing duties were done and I was just ready to go home. And he kept asking me to do shots with him.
> He said, here, let's do a shot. And I said, no, I want to go home and see my boyfriend. Well then bend over and let me see your tits. Let me see your tits before I go to bed.
> I said, I'm going home Jay. My boyfriend is at home. I just want to go home.

Vol. II, 448:20 - 449:5

102. Respondents denied that Jay Wilson said or did any of these things.

Third Discipline of Stover by the Bum Steer

103. Jay Wilson rarely "closed" (counted the tills), but the next morning after Stover refused all of his late night entreaties, he counted Stover's till and determined she was $99.75 short. The Bum Steer's business records indicate that Jay Wilson "Did Bank" (counted Stover's till) and therefore discovered the shortage and that

"Russ Checked" and "Double Checked by Russ" (i.e., Stewart recounted to verify the shortage). Exhibit 5, p. 32. Stewart testified that those records indicated that Jay Wilson counted Stover's till and found the shortage and that he, Russell Stewart, then independently counted and verified the shortage. Vol. I, 77:7-23.

104. This shortage resulted in a third disciplinary notice (Exhibit 6, p. 88), written again by Stewart. The reason for the notice was the "$99.75 short in till" on February 18, 2012. The actions marked on the notice were "First warning – Verbal," "Second warning – Written," and "Other (specify)," with a handwritten specification "Take off of night-shifts do *[sic]* to till being off $99.75." The next step in the progressive disciplinary policy of the Bum Steer could be another "Second warning – Written" unless management felt a more severe sanction was necessary. The "Supervisor Comments" contains the statement "Need to be taken off of nights until Stover can do better on money handling." Stewart signed this write-up on February 21, 2012, and Stover signed it on February 24, 2012, apparently while she was at the bar to work her assigned day shift. Stover did not write any comments in the "Employee Comments" section of the write-up.

105. A photocopy of the till receipt for Stover's February 18, 2012, shift (Exhibit 6, p. 89) accompanied the disciplinary notice that Stover signed. This photocopy did not contain the handwritten comments that appeared within the Exhibit 5, p. 32, copy of the same till receipt regarding who "did bank," who "checked," and who "double checked" the till receipt numbers. Stover signed the disciplinary notice without knowing that her tormenter counted the till and reported the shortage.

106. Sue Wilson and Stewart each testified that they, individually and alone, made the decision to move Stover to day shifts. Balancing the testimony, it is more likely than not that Sue Wilson made that decision. She was very clear that she was the ultimate decision maker, that her husband (president of the corporation) had nothing to do with any hiring and discipline, and specifically "no input into the disciplinary decision." Vol. III, 591:10-15. She was also very clear that, as between she and Stewart, that she had "the ultimate decision making" and that it was my decision to take her off nights" (and that Stewart agreed with her). Vol. III, 590:25 - 591:9. Stewart recalled it as being his decision (Vol. I, 58:9 - 59:6), but on this particular issue, Sue Wilson was quite credible.

107. When the Bum Steer put Stover on day shifts because of the shortage in her till after her February 18, 2012, shift, she earned approximately $30.00 less per shift in tips. Vol. II, 462:13 - 463:19.

Stover's Day Shift Period

108. On Friday, February 24, 2012, Stover worked a day shift. Her till was long $1.05. She worked another day shift on Saturday, February 25, 2012. Her till was correct.

109. On Friday, March 2, 2012, Stover worked a day shift. Her till was short $2.50. She worked another day shift on Saturday, March 3, 2012. Her till was $0.75 long.

110. On Monday, March 5, 2012, Stover worked a day shift. Her till was correct. She worked another day shift on Friday, March 9, 2012. Her till was $1.50 short.

111. After the Bum Steer took Stover off night shifts, she discovered that on day shifts, with Sue Wilson in the business premises for far more of the shift, and with more people walking in and out of the kitchen, Jay Wilson still made passing inappropriate sexual remarks to her, but he was not able to engage in as intense and frequent verbal harassment and could not inflict unwanted and inappropriate physical contact upon her. She testified that she told Stewart that "the best thing that ever happened to me was getting switched to day. He [Jay Wilson] can't touch me anymore. He is saying things to me, but he can't touch me anymore." Vol. II, 462:5-12.

112. Stewart did not conduct any investigation because of Stover's comment, nor did he take any action to protect her on day shifts, even though her comment clearly indicated that the verbal sexual harassment still continued. Stewart admitted that Stover had told him that Jay Wilson's sexual harassment of her was not as bad because she was on day shifts.

> Q. Do you recall what Stover's response was when you spoke about whether Jay Wilson was continuing to sexually harass her?
> A. No, I don't remember that.
> Q. Do you recall telling the hearing -- the Human Rights Bureau investigator that Stover told you it was getting better because she was on day shift?
> A. I do remember that, yeah.

Vol. I, 16:1-9.

113. On Friday, March 16, 2012, Stover worked a day shift. Her till was correct. She worked another day shift on Saturday, March 17, 2012. Her till was $1.25 short.

114. On Friday, March 23, 2012, Stover worked a day shift. Her till was correct.

115. On Friday, March 30, 2012, Stover worked a day shift. Her till was $2.25 long.

116. Though the severity of Jay's harassment decreased after Stover was put on day shift, it continued on through the month of March. Stover talked with Linsey Langlois, and another former bartender, Tara Darling, about what was happening.

117. On or about April 2, 2012, Stover made her first call to HRB to obtain information on how to report sexual harassment by her employer. Vol. III, 544:19 - 546:14; 560:23 - 561:12.

The Bum Steer's "90 Day Employee Review" of Stover

118. Stover was due for a 90-day employee review in March 2012. The employee review was written by Sue Wilson (Exhibit 6, pp. 91-92), and originally dated March 25, 2012. Stewart did not write the employee review. He had consulted with Sue Wilson before she wrote it. He testified at hearing that he agreed with the employee review.

119. Difficulties setting a date and time when management and Stover were available delayed the actual 90-day review until April 4, 2012. On that day, Stewart and Terry Mateka presented the review to Stover. She was credited with two hours of paid time for being there. Exhibit 5, p. 46. This was Stover's first written notice of deficient performance since the February 19 disciplinary notice. The "Employee Performance Review" rated her "poor" in all areas, with no strengths and no prospects for continued employment. She was supposed to be effectively suspended for two weeks, by being taken off the schedule. Exhibit 6, pp. 91-93. Stover asked Stewart about the review. He told her that Sue Wilson had written it and was angry at Stover.

120. Langlois testified that after Stover received her review, Stover seemed "hurt. . . . . She was upset, crying. She just kept asking, am I that bad of a person, am I that bad of a bartender, and saying, I just don't understand and I just don't get it." Vol. II, 364:19 - 365:5.

121. Stover was questioned at hearing about whether she had been "so hurt" by the 90-day review that she had "sought out . . . vengeance against the Wilsons and the Bum Steer by filing this complaint" of discrimination. She said, "No. Because I filed my complaint the day before I got this review." Vol. II, 459:7-14. Actually, she did not file her complaint until April 19, 2012, Exhibit 17, p. 2, but she made her

first contact with HRB approximately two days before she received the review (*see* Finding No. 117).

122. Despite her "two weeks off the schedule" punishment, Stover was called for and worked a night shift on Monday, April 9, 2012 and a day shift on Friday, April 13, 2012. Finding No. 29(E) p. 8 (Exhibit 5, p. 4), Exhibit 5 p. 46, and Exhibit 6, p. 93. The night shift on April 9 ended early, apparently because of a "bar top remodel," and four males, "Rusty, Russ, Brad and Jay" were involved in closing. Stover's till was correct. Exhibit 5, p. 47. Stover's till for the day shift on April 13 was correct – Sue and Jay Wilson confirmed Stover's till. Exhibit 5, p. 48.

How the Scheduling Was Done, and Stover's Last Shifts at the Bum Steer

123. Since before Stover was hired, management kept track of shifts and hours worked on a "time sheet" for each worker, containing fourteen days, from a Sunday on through to the second following Saturday. Each employee entered her shifts worked, by day, date and times, and on the time sheet there were places for management to total the hours and add comments. *E.g.*, Exhibit 5, p. 5. Employees were expected to check a monthly calendar posted on the office wall, or occasionally in a written schedule on the office desk, if the calendar page was off the wall. Sue Wilson, or sometimes Stewart in her absence, would create the schedule for the next two-week period, fill it in on the calendar for those days of the month, and post the calendar. All employees had access to this much of the schedule, any time the business was open. The employees were responsible to inform themselves of the schedule. They did not have to check with Sue Wilson or Jay Wilson (or Stewart before May 2, 2012[10]). If a change was made to the schedule after it was posted, an employee whose schedule had been changed would be called by one of the Wilsons (usually Sue) and notified. Otherwise, employees were not called by any member of management to be told of their schedules, and employees were not expected to call and verify that they would be at work on time. They were expected to check the schedule, find out when they were scheduled to work, and show up as scheduled. The last two week schedule that ended before May 2012 began on Sunday, April 15 and ended on Saturday, April 28, 2012. Exhibit 5, p. 49. On or about April 1, 2012, the two-week period beginning April 15 and ending April 28 was filled in by Sue Wilson, and the calendar put back on the wall for employees to view.

124. Stover worked a night shift on Sunday, April 15, 2012. Her till was correct. Stover closed on her own. Sue and Jay Wilson did books the next morning. Exhibit 5, pp. 49-50.

---

[10] After May 1, 2012, Russ Stewart was no longer working at the Bum Steer.

125. Stover worked a night shift on Tuesday, April 17, 2012. Her till was $0.25 long. Stover closed on her own. Sue and Jay Wilson did books the next morning. Exhibit 5, pp. 49, 51 [the page number on p. 51 is illegible.]

126. On Thursday, April 19, 2012, Stover signed and returned to HRB a discrimination complaint against Jay Wilson and the Bum Steer. HRB received Stover's complaint on Monday, April 23, 2012. FPO, "IV. Uncontested Facts," p. 3, No. 15. Stover knew that the next step in the process would be for HRB to send copies of the complaint to Jay Wilson and to the Bum Steer (*i.e.*, to Sue Wilson).

127. At some point in April 2012, before April 21, 2012, the day of the last shift Stover ever worked at the Bum Steer, Stover left a note for Sue Wilson at the bar requesting time off from "26 – 30th Thursday – Monday." Exhibit 6, p. 98. The testimony of Sue Wilson and of Stover confirm that this refers to April 26-30, 2012. Apparent reasons Stover might have asked for the requested leave included an archeological "dig" that she might attend and her need to work on her thesis. Another possibility might have been that Stover feared that when Jay and Sue Wilson received copies of her Human Rights complaint they would be furious.

128. Stover worked a day shift on Saturday, April 21, 2012. Stewart closed that night. Jay and Sue Wilson were out of town. Sue Wilson "did Bank" on her return on the morning of Sunday, April 22, 2012, and Stover's till was short $51.00. Sue Wilson could find no reason for this shortage. Exhibit 5, pp. 49, 52. Based on Sue Wilson's practice regarding short tills, and in particular regarding the prior large short till from Stover, this was a basis for a fourth imposition of discipline on Stover.

129. The posted April calendar showed Stover with shifts on Sunday and Monday, April 22-23, 2012. As days passed, sometimes changes were made by crossing out or writing over names or writing notes reflecting the changes. After shifts were worked during a particular week, further notes might be added to explain what had actually happened. After the fact, that posted April scheduling calendar eventually reflected that Stover was scheduled to work that Sunday and Monday, that she reported off "sick" on the 22nd, and that she did not work either day. Exhibit 4, p. 111.

130. The handwritten notes on the April 15 through April 28 "time sheet" for Stover indicated that Stover came into the liquor store and bought a bottle on Sunday, April 22, 2012, and that she was "going to a party" that day. The notes also indicate that later on April 22, 2012, Stover called in sick and Stewart gave her the day off, and gave her Monday off, too, because she told him she was not sure she

could work the next day, either.[11] Sue Wilson testified at hearing that she wrote those entries about Stover in Exhibit 5, p. 49, based on "what I was told from Russ when we returned." Vol. III, p. 603:24 - 604:24.

131. In her testimony, Sue Wilson stated that she and her husband were still out of town (on a "honeymoon") on the 22nd and 23rd, having left on perhaps the "17th, 18th, 19th," although she was unsure about the exact dates they were gone. Vol. III, 604:12-24.

132. Stover's till receipts are the best evidence about when Jay and Sue Wilson were out of town. On the mornings of April 16 and 18, Sue and Jay were in Florence and at the bar, because they "did books 4-16-12 AM" (Sunday, April 15, tills, Exhibit 5, p. 50) and "did books 4-18-12 AM" (Tuesday, April 17, tills, Exhibit, 5 p. 51). A till receipt from Saturday, April 21, 2012, reported "Russ closed [Saturday night] J & S out of town Sue did Bank 4-22-12 AM" (Exhibit 5, p. 52). From these documents, it is clear that Sue and Jay Wilson did not leave town prior to the morning of April 18, 2012, when they may have left after they "did books." It is also clear that they were back by the morning of April 22, 2012, when "Sue did Bank." Thus, Sue Wilson was back in town, and had at least been at the bar that morning to complete and check the till receipts, before Stover came in and bought that bottle on April 22, 2012. It means that before Stover called in sick later that same day and before Stover reported to someone at the bar that she might not be able to work the next day either, and was given that day off, too, that Sue Wilson was back on the premises. Before any of the management decisions made that day, Sue Wilson was back on the premises.

133. Stewart testified that he had given Stover the day off on April 22, when she called in sick that afternoon, but that he did not remember if he also gave her the following day off as well, although from the calendar it appeared that he had covered both shifts himself. Vol. I, 93:17 - 95:15.

134. Based upon the substantial and credible evidence of record, Stover was absent from scheduled shifts, of which she was aware in advance, on April 22 and 23, 2012, reportedly because of sickness. The evidence did not establish that her sickness was the result of excessive drinking, or sickness, although either explanation might be plausible.

135. HRB mailed notices of the complaint(s) to Jay Wilson and to the Bum Steer on April 25, 2012, to the Highway 93N address of the residence and the bar.

---

[11] Linsey Langlois testified that around the end of April 2012, she had a brunch at her house, and that Stover was briefly there, may have had one drink, and then left because she was sick and throwing up. Vol. II, 345:13 - 346:2.

The letters were returned to HRB and dated stamped in the HRB office in Helena on Monday, April 30, 2012. Exhibit 17, p. 3. That same day, HRB called the bar, got the P.O. Box address and sent the notices back again. Sue Wilson denied knowing about the notices and denied knowing about the telephone call until after the notices came back and were delivered to the bar and residence at their PO Box address.

136. Sue Wilson testified that before Stover left for her vacation, Sue Wilson told Stover, "to her face," to call in before she left cell phone range to find out when she was next scheduled to work after being off April 26-30, 2012, because the schedule for the two weeks beginning on Sunday, April 29, 2012, and ending on Saturday, May 12, 2012, had not been posted yet. Vol. III, 605:2 - 608:17. This "to her face" direction supposedly happened several days before the new calendar would be in effect.

137. In contradiction to her own testimony, Sue Wilson also testified that she had prepared the schedule for early May consistent with her usual practice of writing up the schedules "two weeks in advance" or "two weeks ahead of time," Vol. III, 602:6 - 603:19. She testified that because she (and her husband) were going out of town, she would have prepared the early May schedule before leaving town. Vol. III, 604:12-15.[12]

138. The Wilsons could not have left earlier than the morning of the 18th, so if Sue Wilson's testimony (in Finding 137) was true, the calendar for early May was completed and posted by May 18, 2012. However, the substantial and credible evidence indicated that the schedule for early May, in calendar form and/or in two week schedule form, was not posted and available until after Stover left Florence for her days off, which could not have been earlier than May 22, 2012.

139. It may not have been impossible for Sue Wilson to tell Stover "to her face" to call before leaving cell phone range to find out the schedule. It is not credible at all that this conversation happened before Sue Wilson left town with her husband. The best evidence indicated that Sue and Jay Wilson could not have left town before April 18, 2012. The best evidence indicated that Sue Wilson was back in town on the morning of April 22, 2012, and Stover had two more shifts scheduled that week before her days off commenced. There is no reason why Sue Wilson would seek out Stover at least a week before she was to be off work, even though she had several shifts left to work, including two shifts after Sue Wilson would get back, to talk to her about making a cell phone range call on Stover's way out of town over a week later. It is incredible enough that Sue Wilson did not get the next two week

---

[12] Counsel for respondents may have intended to ask Sue Wilson about how she would ordinarily have done the schedule, but she answered with testimony of what she actually did do.

schedule done in anything resembling her usual practice of being "two weeks ahead of time." As things actually happened, this alleged "to her face" conversation could only have occurred at all is if it happened on April 22, 2012, when Stover came in and bought the bottle documented in the time sheet for Sunday, April 15, through Saturday, April 28, 2012. There is no reasonable way, on the evidence adduced, that the conversation could have occurred sooner than April 22, and since there is no evidence that Stover was at the bar after April 22 and before she left Florence by April 25, 2012. The 22nd would be "several days" before Stover left Florence, if she left Florence on April 25, 2012. Sue Wilson testified that she told Stover "to her face" to call before getting out of cell phone range when she left "several days" before Stover left on her trip. Vol. III, 606:3-17.

140. However, Sue Wilson adamantly testified that she was only aware of what happened on the 22nd because Stewart told her about it when she got back later. Based on the substantial and credible evidence, Sue Wilson didn't "get back later," she was already back on the morning of April 22, 2012. Considering all of Sue Wilson's conflicting testimony about when she prepared the early May schedule, when she was out of town, what she knew about what happened on April 22-23, and how she knew it, her testimony of giving "to her face" directions to Stover to call on her way out of town, before she was out of cell phone range, to get her schedule for early May, was not credible.

The End of Stover's Employment

141. Sue Wilson testified under oath that Jay Wilson and the Bum Steer received copies of Stover's Charge of Discrimination against the Bum Steer (naming Jay Wilson as the harasser) by mail on Tuesday, May 1, 2012. Vol. III, 608:19 - 609:15. This finding is out of sequence because, for the following findings about the end of Stover's employment, it is important to know when management first learned that she had filed her charges of discrimination.

142. More likely than not, Stover left town without knowing when she was next scheduled to work, because she had not seen any schedule and had not talked to management to find out what shifts she would work. The soonest day she might be scheduled on the new schedule would be May 1, 2012, the day immediately after her days off. On the April 2012 scheduling calendar, it appeared that "Lyndsay" had been written on Monday, April 30, 2012, for the night shift, and then crossed out with "on vacation" written under it. Exhibit 4, p. 111.

143. There is conflicting testimony, summarized in some of the following findings, regarding when Stover was in contact with co-worker Linsey Langlois, even to the point of Stover perhaps contacting Langlois as early as April 25 or 26, or as

late as April 29 or 30. Stover may have called to get her schedule before she got out of cell phone range of the bar. At some point during her days off, she did try to make contact with Langlois at the bar in Florence. She did not call Sue Wilson.

144. Langlois gave some confused testimony about talking to Stover, checking the calendar, and telling Stover that her first shift after she got back from her days off would be on May 4, 2012. Langlois testified that she was cleaning Jay and Sue Wilson's house on Sunday, April 30, 2012, when Stover called and asked her to check the schedule. Vol. II, 355:2-17. Actually, April 30, 2012, was Monday. Sunday was April 29, 2012. Exhibit 4, p. 111. Langlois went on to agree, in this portion of her testimony, that Stover asked her to check the schedule. Vol. II, 355: She testified to what she did next after being asked to check the schedule.

> . . . . And I went in and looked, and it said initially May 4th was what she was scheduled for, which I believe was when she was supposed to come back anyways.
> And then when I went back and looked again for her after they were getting upset and started texting her and stuff, then all of a sudden her name was on May 1st.
>
> Q. You were cleaning the house. Lyndsay asked you to check the schedule.··You went through the bar and looked at the schedule?
> A Yes.
> Q. Was Lindsay's schedule to work May 1st when you looked?
> A. Not the first time.
> Q. Then you went back and finished cleaning the house?
> A. I went back and finished cleaning the house. I went back and forth a few times. Jay and Sue had asked me to ask Lyndsay to have -- to ask Lyndsay to call them.
> And so, you know, I went back and forth from the bar into the house a few times.
> Q. Okay. Did Sue ever ask you to contact Lyndsay about the schedule?
> A. Yes.
> Q. When was that?
> A. The same day.
> Q. Same day. After you checked?
> A. Yes.
> Q. And did you -- were you able to contact Lyndsay again after you told her she didn't work on May 5th or told her she didn't work until the end of the week?

A. I honestly don't remember what the rest of the conversation was after that because, again, I was cleaning the house.

Vol. II, 355:20 - 357:6.

145. According to this testimony, Stover was told on April 29 or 30, 2012, that her first shift after she returned would be on May 4, 2012.

146. However, Langlois signed a statement, which she typed several times under the direction of Sue Wilson, in the presence of Sue Wilson, Terry Mateka and perhaps Jay Wilson, before Sue Wilson approved its content. The statement and Langlois' signature were both dated May 4, 2012. The signed statement appears twice in the record, Exhibit 6, p. 101, and Exhibit 13, p. 451. That statement reads, in its entirety, as follows.

> On Wednesday, April 25th around six in the evening Sue and Terry asked me to call Lyndsay Stover and ask her to return there *[sic – meant* "their"*]* calls. That day I called her 2-3 times and sent her 4-6 text messages with no response back. I left her a voicemail letting her know that she was not in trouble or anything and that Sue just needed Lyndsay to return her calls so she could get Lyndsays *[sic]* availability and put her on the following week's schedule. The next day I talked to her on the phone and over text messages. We talked about work and I told her again that she just needed to call and give them her availability and that they were not mad at her and she is not in trouble. She still failed to communicate with Jay, Sue, or Terry. When I spoke with Lyndsay over the phone on April 26th she asked me to check the schedule and let her know when she worked next, I told her I had no idea what her next scheduled day was and again to call Sue and ask her.

147. Langlois read the statement to herself, and then testified about it:

Q. I want you to take a look at it and go ahead and read over it.
A. (Witness complied.)
Q. So you typed that statement?
A. Yes.
Q. Was it an accurate statement of the events that took place on that day?

A. Mostly. I feel some of it I was pressured into writing for fear of getting in trouble with my own job or being fired if I didn't write it the way they wanted it written.
Q. Who's they?
A. Jay and Sue and Terry, even though he was sometimes a manager and sometimes not.
Q. So did Sue tell you what to write?
A. Yes.
Q. Why -- did you know why she wanted you to write that statement?
A. I didn't really know. ***[Langlois' "guess," p. 359:8-11, about why Sue Wilson wanted her to write that statement is omitted as speculation without foundation.]*** I don't know.
Q. So do you recall whether -- where it says on Wednesday, April 25th, is that -- was that the first time Sue and Terry asked you to contact Lyndsay?
A. I'm not sure honestly with the dates. I mean, I think so.
Q. So did Sue and Terry ask you to contact Lyndsay about the schedule before or after Lyndsay asked you when she worked -- whether she worked the 1st of May?
A. After.
Q. Did they -- did Sue ever tell you to change what you had already written?
A. Yes. This letter was printed I think three times before this copy was printed out and that's the one that was kept.
Q. Okay. So why did you write -- were you worried you were going to get fired if you didn't do what Sue said?
A. Absolutely. I was worried the whole time between Lyndsay and Jay and Sue's issues with each other. I was put in the middle of it, and I was scared if I didn't say the right thing to them and didn't do that, I would get retaliated or punished for not doing it their way.

148. Based on the substantial and credible evidence of record, Stover believed, from what Langlois actually told her, that she would not be working after her last day off until after May 3, 2012. However, before May 1, 2012, and therefore before the respondents received notice of Stover's Human Rights Complaint, the schedule had been changed so that Stover was scheduled to work a shift on May 1, 2012. There is no credible evidence that Stover was notified of this May 1 shift before the text

communications she had with Stewart and Sue Wilson on May 1, 2012, although the testimony of Langlois about her communications with Stover are very confused on this precise point. There is no evidence that Sue Wilson had any notice that Stover had been led to believe that the schedule for early May did not have Stover on it until after May 3, 2012.

149. Stewart testified that he did not remember ever texting Stover before May 1, 2012, to ask if she would be showing up for work on May 1 as scheduled. He acknowledged that the Bum Steer did not have any policy of having supervisors call around to make sure that employees were going to show up for their scheduled shifts. He could not recall who set the schedule for May 1, 2012 (he had set some bar schedules while living with the Wilsons and helping with the bar). Vol. I, 38:20 - 40:25.

150. Stewart testified that he did not remember whether he sent Stover a series of texts on May 1, 2012, asking whether she was going to come to work that afternoon. He did recall sending her a text (but he testified that he didn't "know exactly what it said") and then receiving a return message from her that she was over a hundred miles away, was not going to make it for her shift, but would be there for her next shift. Vol. I, 38:20 - 40:25. In the text Stewart sent to Sue Wilson, he indicated that Stover sent this text at 12:46 p.m.

151. At 6:41 p.m. on May 3, 2012, Sue Wilson sent a text to the work text number that said, "U are off the schedule for next two weeks. U were to call me and u didn't. I told u I was doing schedule u were to call. U are off the schedule until u call. Sue" Sue Wilson later added some hand-writing to the printed copy of this message, noting that this was the "Text from Susan Wilson to Lyndsay Stover," and that the date and time of original message was "May 1st 1:24 p.m." Exhibit 6, p. 99.

152. At 1:46 p.m. on May 1, 2012, Stover sent a text to the work text number that said, "Ok, please consider my two weeks off the schedule my 2 weeks notice, I quit." Exhibit 6, p. 97.[13]

153. The last adverse action the Bum Steer took against Stover during her employment, which was suspending her from the schedule for two weeks (for not calling to get the schedule or for not showing up for the shift on May 1 to which she

---

[13] The print-out of Stover's message actually has a wavy line drawn through it, and then a long hand-written statement, under which were three names, written in what appeared to be three different handwritings. Langlois reviewed the document at hearing, testified that she was "almost positive" the statement was in Sue Wilson's handwriting, denied that the "Linsey Langlois" at the bottom was her signature, acknowledged that she had seen Stover's text message, and denied that she had ever seen the handwritten statement before. Vol. II, 361:22 - 362:14.

was assigned at some point after she left Florence), was taken after respondents had notice of her Human Rights charges. Much of what appeared to be efforts to assure Stover's attendance for her next shift after April 30, 2012 (her last day off) could equally have been efforts to verify when Stover would next be available at the bar, to prepare to take further disciplinary action against her at that time for the large till shortage on Stover's April 21, 2012, work shift, verified by Sue Wilson the next morning, on April 22, 2012.

154. On the April 2012 scheduling calendar, "May 1" was written into the blank square immediately to the right of the square for April 30. At the bottom of this make-shift "May 1" square was written the name "Lyndsay" which is circled. To the right and above it is written, "LL [Laonglois] to work" in small letters, and below those words, in larger letters, closer to the circled "Lyndsay" is written "No Show." Immediately below the bottom of the make-shift "May 1" square on the April 2012 scheduling calendar, some illegible words are written in small and very difficult to read handwriting, following which is written, "extended her vacation w/out approval by Sue." Exhibit 4, p. 111. On the May 2012 scheduling calendar, in the bottom of the May 1 square, above and to the left of some crossed out names, is written "Quit by text." To the right and above the crossed out names is written "Lyndsay No Show" and beneath the crossed out names is written "Quit by text no show."

155. There is no credible evidence that Stover knew she had been $51.00 short on her till on April 21, 2012. There is very credible evidence that Stover knew when she left Florence on or about April 25, 2012, that her employers would soon receive, if they had not already received, copies of her Human Rights complaints. There is very credible evidence that Stover was told by Langlois that Sue Wilson really wanted Stover to call her on the phone. Stover never did call Sue Wilson, and the only reason that she would not want to talk to Sue Wilson that is supported by the evidence is that she feared reprisals for the Human Rights complaints. Stover believed that she had not been originally scheduled to work on May 1, 2012, and now with a text confirmation of a two-week suspension from work for not calling, Stover concluded that her employer was either going to discipline her repeatedly until she quit, or else fire her as soon as justification for discharge could be generated. In either event, for the remainder of her employment, she reasonably believed that her employer would continue to turn a blind eye to the continued and ever escalating sexual harassment and sexual assault inflicted upon her by president of the corporation Jay Wilson. Even if Stover was wrong about the employer's immediate plans, as she may well have been, she was right about the continued malign neglect of Jay Wilson's totally unacceptable sexual harassment and assault. But for the sexual harassment and the employer's failure to take any action regarding it, Stover would

not have decided to quit. Her decision on May 1, 2012, to leave her employment was reasonable. Vol. II, 303:7 - 306:16.

Jay Wilson's Conduct, According to Some Female Employees and former Employees

156. Sandi Moore worked in the bar for two years, in approximately 2008-2010. Vol. I, 219:18-24. She continued to be a customer of the bar thereafter, and saw Stover at work in the bar during Stover's employment there, and sometimes saw Jay Wilson in the bar when Stover was bartending. Vol. I, 214:19-215:2. She did witness Jay Wilson, in the bar, saying, "you make my sticker peck out." Vol. I, 215:11-14 and 218:16-25. She also testified that Stover asked her to wait in the parking lot, when Stover and Jay Wilson were both in the bar at closing, because Stover was nervous when Jay was around and she wasn't allowed to have her boyfriend in the bar anymore. Vol. I, 215:21-216:3. Moore testified that Stover, in approximately the last month of her employment, had reported to her, Moore, that Jay Wilson "wanted to touch her boobs or asked her something when she goes in the bathroom – I don't remember what it was. Stick her fingers in her and leave it," Vol. I, 216:12-16. She also testified that she observed Stover in the last month of her employment "feel uncomfortable" and "tense up it seemed" when Jay Wilson was present in the bar. Vol. I, 219:3-14. This is evidence of prior consistent statements by Stover to Moore (although garbled by Moore), about some of the things Jay Wilson said to Stover at work, at a time before her initial contact with HRB.

157. Caitlin Hoover was a young woman who had worked as a bartender at the Bum Steer from November 2011 through April 2012. She testified that Jay Wilson spoke words to her "to the effect if you showed your tits more you'd make more money." Vol. II, 274:14-19. Jay Wilson denied saying any such words to Hoover. Vol. I, 186:20-23. This is consistent with Stover's testimonoy and contradicts the testimony of Jay and Sue Wilson about Jay Wilson not making such statements to the bartenders.

158. Wilson also denied ever touching Hoover's bottom except one time when he "patted Caitlin on the butt when I pushed her off my lap when she came and jumped on my lap." Vol. I, 186:3-8. He denied that she was working the only time (according to him) that he touched her bottom, insisting that it happened "when she came in and was singing karaoke on one of her off shifts" and had jumped on his lap. Vol. I, 186:9-15.

159. Hoover testified that in the six months or so that she worked at the bar (Vol. II, 272:21-273:21), Jay Wilson smacked her on the rear "a couple of times," but that she had taken it as "just all of us playing around with customers and such." Vol. II, 274:2-13. This wording makes it plain that Hoover recalled Jay Wilson slapped her on the rear when she was working, with "us" meaning "the employees" (including her) "playing around with customers," so that Hoover did not take

offense. According to Hoover this happened more than once. This contradicts respondents' evidence regarding not engaging in such conduct with the bartenders.

160. Hoover seemed a totally unflappable person. She verified one "offensive comment" by Jay Wilson. Vol. II, 275:2-19, when she and her boyfriend were at a table in the bar having a drink, as customers. Jay Wilson sat down with them. Hoover testified that Jay Wilson told the couple that they were going to go home together and that Hoover "was going to sit on his [her boyfriend's] face until I came and he was going to let it dry and eat it like potato chips." Vol. II, 275:13-15. This comment has similarities to what Stover testified that Jay Wilson told her, on February 7, 2012, that he wanted to do to her. Finding No. 93, p. 24. Hoover was asked if she found Jay Wilson's comment offensive, and replied that she would not have paid any attention to it, except that it had seriously offended her boyfriend. Vol. II, 275:17-19. She had already noted that Jay Wilson "apologized right after." Vol. II, 275:9.

161. Jay Wilson admitted this episode, in general terms, while denying that he had said anything to Hoover "about potato chips."[14] Vol. I, 187:13-15.

162. Linsey Langlois started working at the Bum Steer on the same day that Lyndsay Stover was hired. Except when one of the two of them worked the day shift and the other worked the night shift, so they were both working during shift change, they never worked at the same time. Vol. II, 345: 3-9.

163. Langlois was given one "write-up" as an employee of the Bum Steer, for accepting a check that did not have the right information on it. Vol. II, 346:9-14. This would have been a "first warning" documented in writing but considered an oral warning. ***E.g.***, Exhibit 6, p. 81. Although her till was sometimes off, Langlois was never disciplined for being short, even though her till was $75.00 short once. Vol. II, 371:7-25. Although she cashed gaming tickets from previous days, Langlois was not disciplined for it. Vol. II, 346:19-23. Langlois and Stover each testified that the policy regarding gaming tickets, like other employment policies, often changed and was seldom enforced. Vol. I, 22:12-19; Vol II, 389-390, 429:6-432:1, 447:3-21; Ex. 6, p. 83.

164. After her first night shift, when Jan Hubbell was there training her and and showing Caitlin Hoover and her how to close, Langlois closed by herself whenever she worked the night shift – neither Jay Wilson nor Stewart was ever there when she closed. Vol. II, 347:22-348:7. Langlois never worked with Jay Wilson at

---

[14] ***See*** "Opinion," Credibility of Jay Wilson, pp. 62-64, for details of "potato chip" testimony by Hoover and Jay Wilson.

the Bum Steer. Vol. II, 347:15-16. Langlois did not believe she ever worked with Stewart, either, since the times he was there when she worked, although he was nominally a "manager on duty," he was not actively working and was actively drinking. Vol. II., 347:17-21.

165. On the other hand, Langlois was in the bar as a customer sometimes when Stover was working. Vol. II, 345:10-12. Thus, she had opportunities to observe Stover's reaction to Jay Wilson's presence. She observed that "there was tension between them." Vol. II, 348:14-15.

166. Langlois also testified about her interactions with Jay Wilson when she was working at the Bum Steer. She credibly testified that he made comments to her about (in her words) "more tips, more tits, make my sticker peck out, saying I want to lay you down, or if momma wasn't in town I'd fuck you all night long."[15] Vol. II, 348:19-23. She credibly testified that Jay Wilson "absolutely" told her "to show more skin." Vol. II, 349:14-15. She credibly testified that he also "slapped my butt and stuff like that," Vol. II, 363, lines 8-9. She was asked, "When he slapped your butt, were you joking around?" Vol. II, 363:11-12. She credibly responded "No. I mean, it's just kind of normal stuff. You just got used to it because it was the environment of just the sexually charged comments and things like that. You just tried to avoid it." Vol. II, 363:11-16. This all contradicts respondents' denials and evidence that Jay Wilson did not treat bartenders in this fashion, and contradicts Jay Wilson's denials of talking and acting in these fashions with the bar's bartenders.

167. Langlois also credibly testified that she had heard Jay Wilson saying to other female employees, that "their tits look nice tonight or that their ass looks good." She also heard him say, to a bartender whose jacket was zipped up "too high, to show more skin to make more tips." Vol. II, 349:4-13. This contradicts respondents' evidence, including Jay Wilson's denials, that he did not say such things to bartenders.

168. Langlois credibly described Stover's visible reactions to Jay Wilson, the co-owner of the bar, and the only management source of these kinds of comments at the bar, as appearing "nervous, put off by it," and that she seemed "confused, like unsure of what to do and uncomfortable." Vol. II, 349:16-20. This testimony

---

[15] Langlois testified that Jay Wilson "often" said "things like that" to Stover. Vol. II, 348:24-25. However, Langlois did not work when Stover did, and did not clearly testify that she was present as a customer and heard Jay Wilson say "things like that" to Stover while Stover was working. This potentially corroborative "prior consistent statement" testimony was not utilized in these findings, because it lacked sufficient foundation.

confirmed Stover's own testimony about the impact upon her of Jay Wilson's harassment.

169. Langlois characterized herself as being "little more firm than" Stover, but still being herself "nervous and uncomfortable" and added, "You don't really know what to do or say if somebody is bringing those unwanted comments, especially if it's the owner of the business you're employed at." Vol. II, 349:21-350:3.

170. Asked if she had ever told Jay to "knock it off," Langlois credibly testified that she "didn't need to" because she "was able to kind of change the subject and things like that." Vol. II, 350:4-8.

171. From Langlois' testimony, it is clear that Jay Wilson never escalated inappropriate physical contact with Langlois beyond slapping her on the bottom.

172. Langlois corroborated some of Stover's testimony about Stover reporting Jay Wilson's sexual harassment to Stewart.

173. Tara Darling worked as a bartender for the Bum Steer, in 2010 through February 2012, a couple of months after Stover was hired. Darling was a part-time day bartender. Vol. II, 401:5-24. She testified that immediately after starting work at the bar, "the sexual harassment began [by Jay Wilson]," and that she had to "just chalk it off to bar banter" but that it involved physical contact as well as verbal harassment. Vol. II, 402:3-13. She testified that Jay Wilson "at least a handful of times," would push her towards the door to his house, while saying to her "since momma is gone, I'm taking you to bed, things along those lines." Vol. II, 402:14-25.

174. She also described other forced physical contact by Jay Wilson, and testified that he would "say inappropriate things in the smoking room," including suggesting the two of them should have sex in the smoking room, going "to the corner it's where the camera can't see." Vol. II, 403:5 - 404:2. She also testified that Jay Wilson gave her "compliments in a vulgar way" about her breasts, such as "Great tits, I wish could put my mouth on those things" and that he would proposition her to go to bed with him, to have sex. She testified that these behaviors occurred "regularly" during the entire two and one-half years she worked at the Bum Steer, and she defined "regularly" as weekly. Vol. II, 404:13 - 405:15.

175. The respondents offered evidence, essentially for each of the women bartenders who testified about Jay Wilson's conduct, that the women either were or at least behaved as if they were close friends with the Wilsons, that some of the women were themselves observed sexually harassing Jay Wilson, that some of the women acted inappropriately, and that none of the women showed avoidance, aversion, dislike or distrust of Jay. For two of the women, at least, Langlois and

Darling, the respondents also offered evidence that the women had been properly subjected to discipline and discharge, and therefore should be viewed as biased and vindictive. The testimony of each of these women was more credible than the evidence adduced by respondents to discredit them.

176. The testimony of each of these women was consistent with and therefore corroborated Stover's testimony about Jay Wilson's conduct towards her, evidencing similar motives, similar actions when presented with similar opportunities, similar intent, similar preparation and plan for taking advantage, and similar knowledge and use of knowledge about the "blind" spots in the establishment.

The Written Warnings

177. During the month after Stover's constructive discharge on May 1, 2012, she did not frequent the Bum Steer with any frequency at all. For a month after Stover's constructive discharge, Langlois was still an employee of the Bum Steer. The Wilsons attempted to influence Langlois' recollection and potential statements and perhaps ultimate testimony regarding Stover's charges of discrimination, by talking to Langlois about the merits of their defense and the falsity of Stover's allegations. The Wilsons also attempted to use Langlois' friendship with Stover, asking and telling Langlois to communicate with Stover on behalf of the respondents and to persuade Stover to drop the charges. Langlois attempted to avoid being put in the middle between Stover and her employer.

178. Several months after Langlois was fired and shortly after Stover filed her preliminary pre-hearing statement in her Human Rights case, outlining her claims and naming Langlois as a witness, the Bum Steer issued a "Notice of Trespass" to Stover and a "Notice of Trespass" to Langlois on October 27, 2012. Sue Wilson sent "Ban & Bar" letters to Stover and Langlois, each letter stating that "this property" (the Bum Steer) was "restricted" and that recipient of the letter was "directed to leave this property" and "furthermore," that the recipient was "banned from the premises and barred from returning or attempting to return in the future." The recipient was warned that "if you fail to comply with any of these demands, you will be prosecuted as a trespasser." The letters also each stated that they were sent by registered mail on that October 27, 2012. Exhibit 18, pp. 339-40.

179. In a response to a question about when Langlois or Stover were last in the bar before she sent out these letters, Sue Wilson's response was "according to some of our bartenders that were working for us, they were coming into the bar." Vol. I, 149:15-25. Sue Wilson continued, without a new question, to identify Jan Hubbell as one of the bartenders who reported that Langlois and Stover were coming into the bar. No other bartenders were identified as sources of the alleged reports of

Stover and/or Langlois "coming into the bar." When asked whether Langlois and Stover were causing problems within the bar, Sue Wilson answered, "I have no idea." Vol. I, 150:9-11.

180. Jan Hubbell was asked about whether she was working in the bar in September or October of 2012, and whether she saw Langlois or Stover in the bar.

Q. Were you working in the Bum Steer in September or October of 2012?
A. Of 2012?
Q. Yes, ma'am. That would have been approximately --
A. September, October.
Q. Eight months ago.
A. You know, I could have been if Jay and Sue were gone and I was filling in, yes. It could have been. I don't remember. I fill in here. I fill in there.
It could be two or three months since I retired and I haven't been brought back to manage or to train anybody. On occasion to work, yes.
Q. Well, did you report that Lyndsay Stover and Linsey Langlois were coming into the bar in September or October of 2012?
A. That who?
Q. Lyndsay Stover and Linsey Langlois were coming into the Bum Steer in September and October of 2012?
A. I recall seeing Lyndsay Stover come in, but what month it was I do not remember. I remember her and Devon coming in when I was working one shift.
Q. When was that?
A. I don't remember the exact date.
Q. Well, the approximate date.
A. I don't remember.
Q. So it could have been any time between, say, May and December?
A. Yeah, any time probably.
Q. And what about Linsey Langlois?
A. I don't recall seeing her coming in.

Vol. IV, 726:21 - 728:4.

181. The evidence of record did not provide justification for giving the notices to Langlois and Stover, however, there was insufficient evidence to establish either a retaliatory motive for giving the notices or an adverse effect of receiving the notices.

Damages

182. Stover found a full time job with Ravalli County effective July 23, 2012, earning wages of $16.00 per hour, with benefits (which were not available at the Bum Steer).

183. Stover earned an hourly wage of $7.65 at the Bum Steer. She testified that in January and February she averaged $250.00 per week in tips. She also testified that she earned about $30.00 less per day shift than per night shift. Her hours worked appear in Finding No. 29, pp. 7-8 herein.

184. In December 2011, over the last 3 weeks of the month, Stover worked 7 night shifts (54.25 hours total) and 1 liquor store shift (7.25 hours).[16] She earned total hourly wages of $470.48 ($7.65 per hour times 61.5 hours). Using the average shift tips for night shifts and applying the average shift tips for day shifts to the liquor store shift, calculated in Finding No. 186, below, she earned total tips of $1,028.88 (7 times $132.36 plus 1 times $102.36). Her earnings total in December 2011 was $1,499.36

185. In January 2012, over 4.428 weeks, Stover worked 6 night shifts (45.75 hours total). She earned total hourly wages of $308.81 ($7.65 per hour times 45.75 hours). Using the average shift tips for night shifts, calculated in Finding No. 186, below, in January she earned total tips of $794.16 (6 times $132.36). Her earnings total in January 2012 was $1,102.97.

186. In February 2012, over 4.142 weeks, Stover worked 4 night shifts (31.75 hours total), 7 day shifts (42.5 hours total) and 1 liquor store shift (3.75 hours). She earned total hourly wages of $596.70 ($7.65 per hour times 78 hours). At an average of $250.00 per week for tips in January and February, with day shifts and liquor store shifts earning $30.00 per shift less than night shifts, Stover earned "X" dollars per night shift and "X-30" dollars per day shift or liquor store shift. Her total tip earnings for January and February, a period of 8.57 weeks, was $2,142.50 ($250.00 per week times 8.57 weeks). Using a little algebra, her 10 night shifts ("10X") plus her 8 day or liquor store shifts ("8X - 240") earned that $2,142.50. That means that "18X -240 = 2142.50" or "18X = 2382.50." "X," her night shift average tip amount

[16] All shift information in this finding come from Finding No. 29, pp. 7-8.

in January and February, would equal $132.36, while "X - 30," her day shift or liquor store shift average tip amount in January and February, would equal $102.36. Using these numbers, in February she earned total tips of $1,348.32 (4 times $132.36 plus 8 times $102.36). Her earnings total in February 2012 was $1,945.02.

187. In March 2012, over 4.428 weeks, Stover worked 8 days shifts (50 hours total). She earned total hourly wages of $382.50 ($7.65 per hour times 50 hours). Using the average shift tips for day shifts from January and February, calculated in Finding No. 186, in March she earned total tips of $818.88 (8 times $102.36). Her earnings total in March 2012 was $1,201.38.

188. In April 2012, over 3.285 weeks (two sick days and 5 days taken off, for a total of 7 days, subtracted from 30 days in the month, leaving 23 divided by 7), Stover worked 3 night shifts (20.75 hours) and 2 day shifts (12.25 hours). She earned total hourly wages of $252.45 ($7.65 times 33 hours). Using the average shift tips for night shifts and the average shift tips for day shifts, calculated in Finding No. 186, she earned total tips of $601.80 (3 times $132.36 plus 2 times $102.36). Her earnings total in April 2012 was $854.25.

189. Over the entire course of her employment at the Bum Steer, Stover earned a total of $6,602.98 (sum of her total earnings in December 2011 through April 2012). She earned this total during 19.283 weeks (the totals of the weeks over which she earned the total). Her average lost earnings from her constructive discharge are $342.42 per week ($6,602.98 divided by 19.283), from May 2, 2012, to July 23, 2012. Stover's emotional distress fully justified the time that it took her to find replacement income after her constructive discharge by the Bum Steer. Her lost earnings over 11.857 weeks, totaled $4,060.07. The Hearing Officer finds no basis to credit the bar with the two week suspension, since the end of Stover's employment was by constructive discharge.

190. Interest at 10% per annum, simple, accrues before judgment on these lost wages. For each week's wages, the interest begins to accrue after the week (for the week ending May 8, interest begins to accrue on May 9, and so forth). Effective July 23, 2012, no further lost wages accrue, and thereafter prejudgment interest on the entire $4,060.07 accrues. The interest over the 11 weeks and 6 days during which lost wages accrued ("back pay") was $42.40.

Week 1 (May 2-8) interest accrues May 9-July 22	76 days X .1 X $342.42 ÷ 365 =	$7.13
Week 2 (May 9-15) interest accrues May 16-July 22	69 days X .1 X $342.42 ÷ 365	$6.47
Week 3 (May 16-22) interest accrues May 23-July 22	62 days X .1 X $342.42 ÷ 365	$5.91
Week 4 (May 23-29) interest accrues May 30-July 22	55 days X .1 X $342.42 ÷ 365	$5.16
Week 5 (May 30-June 5) interest accrues June 6-July 22	48 days X .1 X $342.42 ÷ 365	$4.50
Week 6 (June 6-12) interest accrues June 13-July 22	41 days X .1 X $342.42 ÷ 365	$3.85
Week 7 (June 13-19) interest accrues June 20-July 22	34 days X .1 X $342.42 ÷ 365	$3.19
Week 8 (June 20-26) interest accrues June 27-July 22	27 days X .1 X $342.42 ÷ 365	$2.53
Week 9 (June 27-July 3) interest accrues July 2-July 22	20 days X .1 X $342.42 ÷ 365	$1.88

Week 10 (July 4-10) interests accrues July 9-July 22	13 days X .1 X $342.42 ÷ 365	$1.22
Week 11 (July 12-18) interest accrues July 16-July 22	6 days X .1 X $342.42 ÷ 365	$0.56
Week 12 (6 days, July 17-22) no interest accrues (not due before judgment date).	TOTAL	$42.40

The accrued interest over the 1 year and 247 days from July 23, 2012, to March 28, 2014, was $680.47.

July 23, 2012 to March 28, 2014 = 612 days (1 year, 247 days)=1.676 years
$4,060.07 lost wages X .1 Interest per year 1.676 years = $680.47

The total accrued prejudgment interest was $722.87.

191. It is not possible to determine how much more (if any) Stover might have earned in March 2012 had she still been assigned to night shifts. Stover had worked more shifts in February, the shortest month of the year, than in any other month of her employment, before or after. There is no valid method proposed in the record to determine what losses she might have suffered during her exile to day shifts. It is also not possible to assign a dollar figure to the reduction in emotional distress that also appeared to occur as a result of the change to day shifts, so that Stover told Stewart that it turned out that ""the best thing that ever happened to me was getting switched" to day shifts. See, Finding No. 111, p. 27. The Hearing Officer finds it is reasonable not to fashion any award for possible lost income resulting from any changes in scheduling for Stover during her employment, and likewise not to fashion any diminished remedy for reduced emotional distress resulting from changes in scheduling for Stover during her employment.

192. Jay Wilson's sexual harassment and sexual assaults, the hostile work environment he created and the Bum Steer perpetuated by ignoring, caused ongoing and substantial emotional distress for Stover. Vol. II, 293:17-294:2, 339:1-7.

193. Jay Wilson's sexual harassment and assaults were so distracting and disturbing to Stover she could not focus on work and her performance actually did deteriorate. The insistence of Sue Wilson that Stover's boyfriend's presence at work was the cause of her deteriorating performance, and the requirement that he not be at the Bum Steer while she was working, took away from the Stover the only source of safety she had while at work, causing further loss of focus, further deterioration in performance, and further emotional distress.

194. Stover failed to prove the amount of progress she did make in her thesis course over time, did not prove the kind of deteriorating performance over time (as the sexual harassment grew worse and worse) in her educational work as was glaringly apparent in the evidence regarding the work environment. This absence of proof of specific causation of disruption of her academic efforts rendered the testimony of her expert about her worsening emotional condition and developing post traumatic stress disorder ("PTSD"), too remote from the status of her thesis work. Stover did not

establish a causal connection between her failure to complete her thesis course on time and the sexual harassment in her employment. Therefore, there being no satisfactory proof of harm in delayed completion of the graduate work, no award to cover educational expenses, or to remedy lost earnings within her profession based upon delay of her graduate degree, is reasonable.

195. Jay Wilson embarrassed, humiliated, and disgusted Stover. Stover feared his unpredictable conduct, and was distressed beyond description by his physical assaults upon her. She often did not want to go to work at all for fear of what Jay Wilson might do to her next. She tried to be vigilant at work to defend herself from Jay Wilson, and the result was that she was mentally and physically exhausted. Vol. II, 298:12 - 302:11.

196. Stover suffered and continues to suffer severe emotional distress, manifested in sleep disturbances, nightmares, weight gain, anxiety, self-doubt, loss of confidence, fearfulness, nervousness, difficulty concentrating, depression, shame, and hypersensitivity. Stover was initially diagnosed with Adjustment Disorder. Without the financial resources to seek counseling, her mental status continued to deteriorate as litigation ensued. By the time of hearing, her symptoms manifested into PTSD. Vol. II, 292:10 - 295:2; 296:3 - 8.297.

197. Stover's emotional distress, anxiety, and depression continue to interfere with her interactions with friends and co-workers. Though she is performing well at her current job, and no long suffers any lost earnings resulting from the illegal sexual harassment, she cannot escape her feelings of mistrust and anxiety about her job performance and male co-workers. Stover's report of emotional distress is credible and consistent with the sexual harassment and assault she experienced. Vol. II, 302:10 - 303:6; 311:10 - 312:2; 333:7 - 334:17.

198. Before her employment at the Bum Steer, Stover had never experienced sexual harassment, sexual assault, or any other significantly traumatic experience. While Stover has a positive prognosis that she will recover from the PTSD from which she now suffers, the sexual harassment and assaults she suffered at the Bum Steer make her more susceptible to the negative emotional effects of traumatic experiences in the future. Vol. II, 303:18 - 305:5.

199. Jay Wilson and the Bum Steer (through its owners and agents), caused Stover's emotional distress throughout her employment by Jay Wilson's sexual harassment of her and the Bum Steer's failure and refusal to take action to protect her from its continuation and escalation. That emotional distress was severe, continues today to be severe, and will continue in the future to be severe until successfully treated.. The value in dollars of that emotional distress, past, present and future, is $100,000.00.

200. Stover will require weekly therapy sessions for 12 to 24 months to overcome the psychological effects of being sexually harassed and assaulted by her former supervisor, the business owner. Jay Wilson and the Bum Steer are responsible for the costs of those sessions, which reasonably is $11,400.00. Attending the sessions will cause her to miss approximately 3 hours of work per week, at an additional expense of $3,744.00 in lost wages. Vol. II, 305:6-306:16, 310:14-311:9.

201. It is reasonable to award all of these damages to Stover as her immediate recovery.

202. Jay and Sue Wilson continue to own and manage the Bum Steer. Their conduct in this matter indicate they will likely engage in similar conduct in the future with other employees and patrons, therefore affirmative action to address and ameliorate that likely future conduct is necessary and reasonable..

IV. Opinion[17]

1. Continuing Objections – Those Now Sustained and Those Still Overruled

As a preliminary matter, both parties preserved several continuing objections regarding various lines of inquiry by opposing counsel. This Hearing Officer frequently will permit such continuing objections, so that the record can be as complete as possible, whether the evidence is initially admitted subject to a later reversal of the ruling or whether the ruling is deferred until the decision.

Having considered all such objections in light of the complete record, and despite the failure of either counsel effectively to renew their objections in briefing, as they were repeatedly invited, on the record, to do, the Hearing Officer now rules upon those reserved objections and unexercised rights to move to strike.

The Hearing Officer overrules all continuing objections interposed by counsel for Stover. The rulings allowing testimony and admitting evidence stand, with one clarification regarding hearsay evidence about the men's bathroom incident. No part of that evidence will be struck from the record. However, as noted in the Findings of Fact, the men's bathroom incident was not proved. The reactions of management to the report of that unproved incident are the basis of findings relevant to this decision, and the report of the incident itself therefore should be and is in the record as context for those findings, even though the incident itself, being unproved, never happened, for purposes of this decision.

---

[17] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

The Hearing Officer sustains the respondents' continuing objections to all of extensive testimony by HRB investigator Sam Mahlum regarding oral statements by Jay Wilson and Sue Wilson to him during his investigative interviews of them, and to extensive examination of both Wilsons regarding those same interviews, and all such testimony is struck from the record and disregarded in its entirety. All such evidence is evidence regarding inadmissible findings of the investigator and also proof of matters outside the appropriate scope of relevance in this case, since the investigator's findings are inadmissible here. The value of extraneous evidence about alleged prior admissions of parties opponent is far outweighed by the waste of time and confusion of the record involved in presenting such evidence.

The only purpose of admitting a copy of the Final Investigative Report (Exhibit 12) was as evidence of the Wilsons' extensive comments added to their copy of that report, evidencing the Wilsons' disagreements with the investigator's findings and his reports of what the Wilsons had said to him. Since there were no other purposes for the admission of that FIR, and since the evidence regarding both Mahlum's accounts of such oral statements and Wilsons' disagreement with those accounts is not admissible herein, Exhibit 12 is also withdrawn from the record and disregarded in its entirety.

The time spent in presenting that evidence far exceeded any proper purpose for admission of this evidence. The Hearing Officer followed his common practice of allowing evidence in subject to subsequent proof and citation to appropriate law, but in this case far too much time was taken putting in evidence for which there never was any proper use in deciding this case.

All other continuing objections by respondents remain overruled and the evidence admitted remains in the record. However, the Hearing Officer has not utilized the extensive evidence about how Jay Wilson allegedly interacted with female customers. That evidence is insufficiently similar to the evidence about his treatment of bartenders, and involves women who were not employees of the bar (in some instances, at least not at the times of the alleged events). This is not appropriate evidence admissible to prove something other than character, such as motive, intent or plan. Character evidence is not admissible to prove that the person acted in conformity therewith at times pertinent to the case. Mont. R. Evid. 404(b). The Hearing Officer has not considered that evidence in reaching the decision in this case.

Stover Proved Her Sex Discrimination Claims by Direct Evidence

The Montana Human Rights Act ("HRA") prohibits discrimination in employment because of sex. Mont. Code Ann. §49-2-303(1). An employer directing unwelcome sexual conduct toward an employee violates her right to be free from

discrimination whenever the conduct is sufficiently abusive to alter the terms and conditions of her employment, thereby creating a hostile work environment. *Brookshire v. Phillips*, HRC Case #8901003707 (April 1, 1991), ***aff'd sub. nom.*** *Vanio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993). As the Montana Supreme Court has explicitly recognized, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" in violation of the HRA. *Harrison v. Chance*, 244 Mont. 215, 221, 797 P.2d 200, 204 (1990). To be actionable under the HRA, sexual harassment must be because of gender. ***E.g.***, *Stringer-Altmaier v. Haffner*, ¶24, 2006 MT 129, 332 Mont. 293, 138 P.3d 419. There are two forms of sexual harassment that violate the prohibition against workplace discrimination under state and federal law – there is harassment involving conditioning of concrete employment benefits on sexual favors ("*quid pro quo*"); and there is harassment that creates a hostile or offensive work environment. *Meritor Savings Bank, FSB v. Vinson* (1986), 477 U.S. 57, 64 (1986). The form of harassment at issue in this case is a hostile or offensive work environment. *Stringer-Altmaier* ***at*** ¶19.

The anti-discrimination provisions of the HRA closely follow a number of federal anti-discrimination laws. Montana courts have considered and followed federal case law appropriately illuminating the HRA. *Crockett v. City of Billings (*1988), 234 Mont. 87, 761 P.2d 813, 816. Stover established a prima facie case of sexual harassment with proof that she was subjected by Jay Wilson to conduct "which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). A totality of circumstances test is used to decide whether a claim for a hostile work environment has been proved. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, (1993); *Benjamin v. Anderson*, ¶53, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039. Relevant factors include "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. ***at*** 23; *Benjamin* ¶53.

The standard for finding a hostile environment must be "sufficiently demanding to ensure that [anti-discrimination law] does not become a 'general civility code.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998), ***citing*** *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998). The correct standard when properly applied will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Faragher, **supra, quoting*** B. Lindemann & D. Kadue, Sexual Harassment in Employment Law 175 (1992). In other words, only extreme conduct can discriminatorily alter the terms and conditions of employment. The objective

severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. *Oncale, **supra, quoting** Harris,* 510 U.S. ***at*** 23. It is appropriate, when assessing the objective portion of a charging party's claim, to assume the perspective of the reasonable victim. ***See** Ellison, **op. cit. at*** 879.

The department follows the Montana Rules of Evidence in making contested case fact determinations. "Notice of Hearing," September 27, 2012, p. 2; ***see also*** Admin. R. Mont. 24.8.704 and 24.8.746. Applying those Rules, the evidentiary framework for department discrimination cases is the same as that applicable in district court civil trials. The burden of producing evidence is initially upon the party who would lose if neither side produced any evidence; thereafter, the burden of producing evidence shifts to the party against whom a finding would issue if no further evidence was produced. Mont. Code Ann. §26-1-401. In discrimination cases, as in most civil cases, the ultimate burden of persuasion always rests upon the party advancing the particular claim or defense. ***E.g.,*** Mont. Code Ann. §26-1-401; *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787, 791, ***citing*** *Texas Dept. of Comm. Affairs v. Burdine,* (1981), 450 U.S. 248, 253; *Taliaferro v. State* (1988), 235 Mont. 23, 764 P.2d 860, 862; *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 818.

In civil cases, a preponderance of the evidence – enough to persuade the fact finder about what is more likely than not true – is sufficient to establish the truth of any fact at issue. Mont. Code Ann. §26-1-403(1). When the record contains conflicting evidence of what is true, the fact finder decides the credibility and weight of the evidence. *Stewart v. Fisher* (1989), 235 Mont. 432, 767 P.2d 1321, 1323; *Wheeler v. City of Bozeman* (1989), 232 Mont. 433, 757 P2d 345, 347; *Anderson v. Jacqueth* (1983), 205 Mont. 493, 668 P.2d 1063, 1064. In this regard, the standard for deciding facts is still the preponderance of evidence standard. ***Cf.,*** *Pannoni v. Bd. of Trustees,* ¶73, 2004 MT 130, 321 Mont. 311, 90 P.3d 438, (Cotter, dissenting) (defining the preponderance standard as "more likely than not").

In the plurality holding from *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), the United States Supreme Court discarded use of the *McDonnell Douglas* analysis in cases where direct evidence was presented that an unlawful consideration played a motivating role in an employment decision, ruling that such direct evidence is sufficient to support a finding of unlawful discrimination. Montana has adopted that same principle. *Laudert v. Richland County Sheriff's Office,* ¶¶27-28, 218 MT 2000, 301 Mont. 114, 7 P.3d 386.

"Harassment need not be severe and pervasive to impose liability; one or the other will do." *Hostetler v. Quality Dining, Inc.,* 218 F.3d 798, 808 (7th Cir. 2000).

In this case, Jay Wilson succeeded in achieving both severe and pervasive harassment, with sexual innuendoes and direct statements, and with escalating unwelcome sexual physical contacts.

To be sufficiently severe or pervasive, the conduct must create a working environment that is objectively and subjectively offensive. *Beaver v. Mont. DNRC,* ¶31, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. As such, the environment must be one that a reasonable person would find hostile or abusive, and one that the victim in fact perceived as hostile and abusive. As the findings amply demonstrate, Jay Wilson did a very thorough job of making the working environment one that any reasonable woman would find, and that Lyndsay Stover in fact did find, hostile and abusive. The totality of these circumstances were physically as well as emotionally threatening and humiliating, and did unreasonably interfere with Stover's work performance. Jay Wilson's crudity transcended by several orders of magnitude the sporadic use of abusive language, outdistanced by far gender- related jokes, and did not occupy the same universe as occasional teasing.

An employer can have vicarious liability for failing to take adequate steps to protect an employee from a discriminatory hostile working environment. *Beaver, supra, Altmaier, supra.* In this case, the corporate employer's president inflicted the discriminatory hostile working environment, Stover reasonably resisted and rejected the verbal harassment, reasonably rebuffed and extricated herself from the physical contacts and attempted to give notice to another of her supervisors, a friend of Jay and Sue Wilson, who was also designated her supervisor and who administered discipline to her. Stover reasonably feared notifying Sue Wilson about Sue Wilson's husband's sexual harassment, and respondent superior vicarious liability attached to the Bum Steer for Jay Wilson's infliction upon Stover of a hostile and abusive work environment during her employment by the Bum Steer.

As already discussed, Stover proved, with direct evidence, that she was subjected to sexual harassment at work at the Bum Steer. This was direct evidence, far more solid than examples of "not direct evidence" discussed in *Price Waterhouse.* Direct evidence can relate to the adverse action taken against the charging party or to the respondent's discriminatory intent in taking that action. *Foxman v. MIADS* (6/29/1992), HRC Case #8901003997; *Edwards v. Western Energy* (9/8/1990), HRC Case #AHpE86-2885; *Elliot v. Helena* (6/14/1989), HRC Case #8701003108. The direct evidence here established adverse action – subjection of Stover to continuing and escalating sexual harassment.

It also established discriminatory intent – intentional sexual harassment of an employee under his supervision by the president of the corporation and one of Stover's direct supervisors. In this case there also was ample evidence of the malign

intent of Jay Wilson. He was given plenty of direct statements and actions by Stover that she found his words and actions unwelcome and hostile. He could not have had any reasonable doubt that his words and acts were harmful, and yet his conduct continued.

Respondents Failed to Prove that Stover's Direct Evidence Was Not Credible or Otherwise Refute Stover's Direct Evidence Case

When direct evidence proves illegal discrimination, the burden of persuasion (not just the burden of production of evidence) shifts to the respondent, to prove either that the direct evidence is not credible or that any illegal motive played no role in the action taken. This requires proof that the adverse action would have occurred even without the discriminatory motive, or that the direct evidence of discrimination is not credible and unworthy of belief." *Carney v. Martin Luther King Homes, Inc.* (8th Cir. 1987), 824 F.2d 643, 648; *Fields v. Clark University* (1st Cir. 1987), 817 F.2d 931, 935; *Blalock v. M.T.I.* (6th Cir. 1985), 775 F.2d 703, 712. Unless the respondent meets this burden with sufficient proof to discredit the direct evidence or to show a non-discriminatory legal justification for the adverse action, the charging party's direct evidence proves the illegal discrimination. *Blalock at* 707. Direct evidence of discrimination establishes a violation unless the respondent proffers substantial and credible evidence either rebutting the proof of discrimination or proving a legal justification. *Laudert, supra.*

In terms of a legal justification, there can be no legal justification for illegal sexual harassment. In this regard, some of the evidence upon which respondents stridently insisted was of no avail in defense of the harassment charges.

Respondents' counsel did a very good job of presenting evidence from which it could be argued that some of what Jay Wilson allegedly said to Stover didn't make literal sense. For example, Tracy Perry testified that while Sue Wilson was in California, Perry, in addition to Stewart, was staying in the Wilson residence attached to the bar. A reasonable inference would be that Jay Wilson could not be trying to seduce or induce Stover to come back to the residence with him for a meaningless private frolic, not with so many others at home in that residence.

Such impeachment would be effective if proof that Jay Wilson proposed such a liaison to Stover required that he be making a genuine attempt to seduce her or to bully her into coming back to the residence for sexual activity with him. However, the evidence was clear that Jay Wilson made a lot of extremely inappropriate statements to people that could not possibly have been, under the actual circumstances, genuine attempted seductions. Jay Wilson's actual subjective expectations in making those statements are, in the final analysis, entirely irrelevant

and so impossible to prove as to be entirely speculative. A reasonable person, presented with the evidence of Jay Wilson's words and acts, can conclude that by saying those words and taking those actions he intended to discomfort, embarrass and shock his female target. In addition, there were frequent times when what Jay Wilson said manifested his intent to make immediate sexual contact with Stover without her consent, or to bully her into allowing him immediate sexual contact. Indeed, increasingly, on night shifts, what Jay Wilson did was to make immediate sexual contact with Stover over her repeated objections and physical resistence, right then and there in the bar.

In all of these ways, what Jay Wilson said and did was illegal sexual harassment, and it was clearly because of sex in this case, because it was directed at Stover. It matters not whether his motive was sexual gratification, or a sense of power at forcing his attentions upon his unwilling target, or even just a perverse pleasure at frightening or disgusting that target. Workplace harassment based on gender is unlawful discrimination prohibited by Mont. Code Ann. §49-2-303(1). An employer who engages in conduct of a sexual nature toward an employee because of her sex, which is unwelcome and sufficiently abusive to alter the terms and conditions of employment creates a hostile working environment that violates the employee's right to be free from such discrimination. Pervasive use of derogatory or insulting sexual language when an employer is dealing with an employee and addressed to her because she is a woman is evidence of a hostile environment. As the Montana Supreme Court has explicitly recognized, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" and violates the Montana Human Rights Act. *Harrison v. Chance* (1990), 244 Mont. 215, 221, 797 P.2d 200, 204, citing *Meritor Savings Bank FSB v. Vinson*, (1986) 477 U.S. 57,64.

Constructive Discharge

Montana's citizens by statute have a right to be free from discrimination and this includes a specific right "to obtain and hold employment without discrimination." Mont. Code Ann. § 49-1-102. Violation of that right is a ***per se*** invasion of a legally protected interest – the Human Rights Act demonstrates that Montana does not expect any person to endure harm resulting from the violation of such a fundamental human right. *Johnson v. Hale* (9th Cir. 1991), 940 F.2d 1192; ***cited in*** *Vortex Fishing Sys. v. Foss*, ¶33, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. Thus, while Sue Wilson did not discharge Stover, and Stover understood as much, Stover was under no obligation to continue to endure the discrimination, and clearly was enduring an extremely hostile work environment. Because the adverse employment actions taken included the malign neglect of protecting Stover from

escalating sexual harassment. Stover was not required to endure such illegal conduct, her decision to quit flowed from the illegal discrimination, and it was brought on by employer conduct that, in addition to being illegal discrimination that no Montanan is obligated to endure, was also, by the very nature of Jay Wilson's conduct, such outrageous conduct that having to endure it without protection as a condition of continuing to work for the Bum Steer constituted a constructive discharge.

There is federal case law under Title VII holding that if an employee quits her job after being unlawfully discriminated against, she is not entitled to lost wages unless she is constructively discharged. *See, e.g., Brooms v. Regal Tube Co.*, 881 F.2d 412, 423 (7th Cir. 1989)(a Title VII claimant who quits is entitled to collect back pay only where the claimant is constructively discharged from employment). *See also, Marten Transport v. Dep't of Industry, Labor & Human Relations*, 176 Wis. 2d 1012, 501 N.W. 2d 391, 397 (Wis. 1993)(adopting rationale of Title VII cases and holding that under Wisconsin's anti-discrimination statutes, where an employee quits but is not actually or constructively discharged, no award for back pay is permissible even if the employee is found to have been discriminated against)(Bablitch, J., dissenting). The rationale behind these cases is that unless the employee is subjected to some type of other conduct aside from unlawful discrimination, "society and the policies underlying Title VII will best be served if, whenever possible, unlawful discrimination is attacked within the context of existing employment relationships." ***Id. at*** 396, ***citing*** *Jurgens v. E.E.O.C.*, 903 F.2d 386, 390 (5th Cir. 1990). In other words, an employee who quits "only" because of illegal discrimination is considered to have voluntarily abandoned a perfectly good job.

In light of Mont. Code Ann. 49-2-201 which enshrines in statute the right to obtain and hold employment without discrimination and in light of Montana case law that unequivocally demonstrates that no person is expected to endure harm resulting from discrimination, it makes no sense ever to require a charging party to prove something beyond unlawful discrimination to justify quitting her job. But even if Montana were to parse various kinds of illegal discrimination, and only for the "really bad" ones permit the discrimination itself to validate leaving work as a constructive discharge, Lyndsay Stover was unquestionably subjected to the one of the "really bad" kinds of discrimination.

Fallacious Defenses

Proffer of false reasons for adverse action evidences a hidden and probably discriminatory reason for the action. ***See*** *McInnis V. Alamo Comm. College Dist.*, 207 F.3d 276, 283 (5th Cir. 2000). Changing reasons as the investigation and litigation progress can also indicate pretextual explanations, showing discrimination. *Hernandez v. Hughes Missile Systems Co.* (9th Cir, 2004), 362 F.3d 564, 569:

> From the fact that Raytheon has provided conflicting explanations of its conduct, a jury could reasonably conclude that its most recent explanation was pretextual. *See E.E.O.C. v. Sears Roebuck & Co.*, 243 F.3d 846, 853 (4th Cir. 2001) ("[A] factfinder could infer from the late appearance of [the employer's] current justification that it is a post-hoc rationale, not a legitimate explanation for [its] decision not to hire [the employee]."); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) ("We are disquieted . . . by an employer who 'fully' articulates its reasons for the first time months after the decision was made."); *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000) ("When a company, at different times, gives different and arguably inconsistent explanations [regarding its reasons for terminating an employee], a jury may infer that the articulated reasons are pretextual."); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996) ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext"), ***opinion amended by*** 97 F.3d 833 (6th Cir. 1996).

The evidence in this case did not support the exaggerated claims that Stover dressed far too provocatively for the "bar culture." But even more important for the present analysis, if she had dressed far too provocatively for the "bar culture," that would not be a justification for Jay Wilson to subject her to prolonged and escalating sexual harassment. "The way she dressed, she was asking for it" is a barbaric and archaic attack upon the victim, and has no legal sufficiency. As a "reason" for sexual harassment, this was a baseless reason. Proffering this particular false "reason" was probative evidence of the discrimination alleged.

In addition, the employer never disciplined her for her style of dress. Although Jay and Sue Wilson offered testimony that they had expressed concerns about her attire at work, they at the same time offered testimony that they had complimented her about how she looked at work. The evidence of alleged communications that the employer wanted her to dress a little more conservatively flew in the face of the substantial and credible evidence that Jay Wilson was busy trying to get her to reveal more! As a justification for any adverse action, alleged provocative dress at work was unproved and disciplinary action based upon her choice of attire was never even attempted, making the justification doubly indicative of the discrimination alleged.

The same comments can be made about the attempts to establish that Stover engaged in inappropriate sexual conduct at work. If respondents had proved the

incident, which they never really even attempted to do, engaging in consensual sexual activity in the workplace might well be inappropriate and a basis for discipline. But how could it ever justify unwelcome and hostile sexual harassment from an owner and supervisor? "I heard that somebody told a bartender she had sex in the bathroom with a customer" is neither a defense to nor a justification for management sexual harassment of a female employee. Actual admissible evidence that she had consensual sex in the bathroom with her boyfriend, or any other person, for example, would be neither a defense to nor a justification for management sexual harassment of a female employee. As a "reason" for sexual harassment, this unproved accusation had no traction, and was another indication that discrimination occurred.

Finally, just as for the "improper attire" fallacious defense, there is no evidence that the employer made any attempt to impose discipline for this unproved incident, lending further credence to the discrimination charges.

Evidence that the illegal discriminatory motive played no role in the adverse action taken can defeat a charging party's recovery for her a direct evidence case. But the adverse action at the heart of the sexual harassment claims of Stover was Jay Wilson's sexual harassment, which under no circumstances could be a justifiable adverse action. Thus, there can be no "mixed motive" defense to the sexual harassment claims, because respondents have not been able to establish that evidence of the sexual harassment is unworthy of belief, and the sexual harassment is, itself, the adverse action at issue.

Maintaining a spurious defense until the eve of trial is also indicative of pretext. For five months during prehearing proceedings, respondents denied that Jay Wilson supervised or exercised any other authority over Stover. Ten days before hearing, they admitted that he had been one of her supervisors throughout her employment. No reason to be so recalcitrant about admitting to the clear truth that Jay Wilson did supervise Stover appears in this record.

Finally, respondents made an all but gratuitous attempt to assert that Stover used illegal drugs, based solely on Tracy Perry's curious testimony that in a casual conversation when she first had met Stover, at the involving the efforts of Stover to lose weight, Stover admitted, out of the blue, that to lose weight she "just did meth." Vol. III, 658:10 - 659:17. Stover testified in response, at Vol. IV, 751:17 - 752:6:

> Q. Did you ever tell Tracy Perry that you used methamphetamine?
> A. No.
> Q. What do you recall saying to her about dieting?

A. Her and I were out in the smoking room and she -- we were just discussing losing weight. And she was talking, yeah, she needed to lose weight, too.
I said, I use this stuff called Metifast and it really works. I lost 45 pounds on it. It's really great. You should try it.
And she said, well, I don't know. I'll check it out.
Q. Have you ever used methamphetamine?
A. No.

Stover was a graduate student, with some work experience. She appeared to have been poorly prepared to deal with a "bar culture" in which her employer would ruthlessly harass her with sexual talk, sexual propositions, sexual contacts, and escalating efforts to bully her into participating in sex play in the work-place. But there is nothing in this record that suggested that she was so unwise as to tell a virtual stranger (and a friend of her employer), with whom she was visiting in the place of employment, that she used dangerous and debilitating illegal drugs to lose weight.

Credibility of Sue Wilson

Sue Wilson, for the most part, was a credible witness. However, some of her testimony was not credible at all. For example, her testimony regarding the men's bathroom incident cast grave doubt upon her credibility.

Hearsay is an out of court statement offered into evidence to prove its truth. Rule 801(c) Mont.R.Evid. When a witness testifying at trial states "I heard him say that the car was blue," the assertion of the car's color is hearsay. In plain language, hearsay is rumor and gossip--second hand information about what somebody said some other time and place. Hearsay is inadmissable. Rule 802 Mont.R.Evid. Reasonable people, in the conduct of their own affairs, do not usually rely upon second hand information to decide what is really true. Reliance upon hearsay is reliance upon rumor and gossip, and rumor and gossip are not a valid basis for deciding the facts in a contested case or trial. The opposing party has no opportunity to question the people who made the statements, since the witness is repeating what was said elsewhere at another time. The people who made the statements do not testify under oath as to their belief in the truth of the statements. No one has the opportunity to inquire into their basis for believing the truth of the statements, if they do. No one has the opportunity to inquire into the accuracy of the witness' recitation of what the people said they had heard. There is no fairness in reliance upon rumor and gossip.

The incident in the men's bathroom was not proved by any admissible evidence offered at the hearing. There was hearsay testimony about what an unnamed male customer said to Marcie Paske, and there was Paske's hearsay testimony about what she said, on at least two occasions, to Sue Wilson about what she heard. Both women testified about what was written up after Sue Wilson and Marcie Paske had discussed the incident at least twice, and Paske's signed "statement" was put into evidence. There was testimony by Sue Wilson (twice) about what she saw on a security video and why she did not save or copy the video. All of the evidence was, at the core, hearsay.

The testimony of the unidentified male customer of what he saw and when he saw it, would have been some of the best evidence of the incident in the men's bathroom. Then both sides would have been able to question the witness about what he saw and when he saw it, and test the truth of what he was saying under oath. There is no way to know how that would have developed, because this unidentified male customer was never called to testify and was never even identified. The respondents alone could have done that, because the respondents alone had the means to identify him.

The video itself would have been the best evidence of Stover entering the men's bathroom at a time when the bar was open and operating. According to Sue Wilson, she didn't copy it, because she was not disciplining Stover or because the video machinery malfunctioned.

But even producing and playing the video might have raised questions. Was there video of Stover coming back out of the men's bathroom? If not, why not? Was there video of the "guy" (with whom Stover was reportedly engaging in the act) both entering and later leaving the men's bathroom? If not why not? After any video of both alleged participants in the act entering the bathroom, and before any video of either or both of them leaving the bathroom, was there video of the male customer approaching the bathroom area over by the pool room (as described in Paske's testimony), advancing to a place from which he could see into the men's bathroom, then hastily retreating and leaving the bathroom area, as he told Paske he had done? If not, why not? Did it happen at all?

With conflicting explanations of why no video was produced in evidence, and only hearsay testimony about the event that allegedly occurred, there were too many questions about the alleged incident to make findings about what, if anything, actually happened at some point on some date in early January 2012 in the men's bathroom in the bathroom area over by the pool room, allegedly between Stover and "some guy." As a result, this decision contains no findings about the incident itself – whether it actually happened, who was involved, and so forth. However, Paske's

testimony about what she heard, as proof that it was said to her, not that it was true, leading then to transactional testimony about the communications between Paske and Sue Wilson, including the writing of Paske's statement, and testimony about the communications between Sue Wilson and Langlois about the alleged incident, are all admissible, and potentially relevant.

For one thing, the conduct of Sue Wilson was certainly relevant to consider her attitudes toward Stover, and the findings about what was said and done with the report of the incident after it was received by Paske and communicated to Sue Wilson was very relevant to Sue Wilson's credibility. Her exaggeration of what the unproved incident established, and her inconsistent explanations about the security tapes, raised doubts about her credibility, as set forth in the findings.

Those doubts were reinforced by other instances in which Sue Wilson seemed to overstate the truth in ways that reflected negatively on Stover. The findings reflect how Sue Wilson joined her husband in overstating how inappropriate Stover's choices about what to wear to work were, for example. The findings also reflect that Sue Wilson documented Stover's absence from work due to illness on April 22-23, 2012, in such a fashion as to suggest that her sickness resulted from excessive drinking, but respondents failed to present sufficient credible evidence to prove it.

Sue Wilson's testimony about when she was in town and what transpired with Stover just before her sick days and about Stover's subsequent days off in late April also damaged her credibility. Her testimony about when she and her husband were gone for a "honeymoon" was inconsistent with the notes on Stover's till receipts about when the Wilsons were at the bar and handling some till counts. As noted in the findings, the till receipt notes indicated that Sue and Jay Wilson "did books" on the mornings of April 16 and 18, 2012, and then were out of town (having not left any earlier than the morning of the 18th), but were back by the morning of April 22, since Stewart closed the night of the 21st and noted "J & S out of town" AND "Sue did Bank 4-22-12 AM"(Exhibit 5, p. 52). From these documents, it appears that Sue Wilson could not have told Stover "to her face" to call before leaving cell phone range" after the morning of April 18, on up through Stover's absences due to sickness on April 22 and 23. By the till receipts, and by her own testimony under oath that she found out about Stover's absences on the 22nd and 23rd from Stewart after the fact and was not present, Sue Wilson was not at the bar to have a face-to-face conversation with Stover at any point during that time.

Why would Sue Wilson earlier in April than the morning of the 18th, tell Stover "to her face" to call before leaving cell phone range when leaving for her days off? Was Sue Wilson already planning to withhold the next schedule until after

Stover left on her days off, almost a week later (first scheduled day off was the 26th)? Why?

In light of all of these credibility problems related to Sue Wilson's negative testimony about Stover, the questions that arose about the failure of Stover to participate in training on December 19, 2011, apparently because she had been drinking, were properly and fairly resolved against Sue Wilson's accounts. Sue Wilson testified that three new hires (apparently Stover, Hoover and Langlois) were scheduled to be trained that date by Jan Hubbell, but that Stover was drunk ("wasted" was the word she used) when the training was convened and could not participate, costing the bar an extra day of training and an extra day of wages for Jan Hubbell, who was then scheduled to train Stover on December 22, 2011. Vol. III, 587:13 - 588:4. Stover testified that she declined the December 19, 2011, formal training because she had "a couple drinks with some friends," didn't think she was capable of getting behind the bar, didn't think she could learn anything appropriately and didn't think it was right. Vol. IV, 752:7-20. Sue Wilson's frequent enlargement of the ways that Stover was a problem for the bar damaged her credibility to the point that her version of the circumstances on December 19, 2011, was less credible.

Credibility of Jay Wilson

Evidence of Jay Wilson's lack of credibility appears throughout the findings, in multiple sections addressing Jay Wilson's conduct towards Stover, as well as in the section, "Jay Wilson's Conduct, According to Some Female Employees and former Employees." He was not at all credible.

Jay Wilson was frequently evasive, often self-contradictory, and many times truly incredible. In addition to all of the findings demonstrating his lack of credibility, a remarkable example of how incredible he could be appears in the testimony about the "potato chips" comment that he made to Caitlin Hoover and her boyfriend. Finding Nos. 163-64, pp.40-41. Here is Hoover's account of the incident.

Q. You were in the bar one night with your boyfriend, weren't you?
A. Uh-huh.
Q. Jay came up to you and made some comments to you, didn't he?
A. We were all sitting at the same table and having drinks together, yes.
Q. And did he make any offensive comments to you that night?

A. Yeah, there was an offensive comment made. He apologized right after.
Q. What was the offensive comment?
A. It was directed towards my boyfriend. And he had said that we were going to go home and I was going to sit on his face until I came and he was going to let it dry and eat it like potato chips.
Q. You didn't find that offensive?
A. That was something that I would have easily blown off. My boyfriend was pretty offended by it, so that affected me.

Vol. II, 274:24 - 275:19.

Hoover provided clear and credible testimony about what Jay Wilson said, to both her boyfriend and her, when the three of them were sitting at the same table in the Bum Steer. But the testimony of Jay Wilson, on the same incident, being examined by the same attorney, presents a rather different and entirely incredible story.

Q. And then in February 2012, Hoover was in the Bum Steer with her boyfriend as a customer, do you recall that?
A. Yes.
Q. And you made a comment at Hoover's table and said you were sure that they were going to go home and have wild sex that night?
A. I was talking to her boyfriend, and I don't remember the exact phrase. And he didn't like it. He said something to Caitlin because she had come back. She called me over to the side and said, I don't appreciate that. I said, okay, done. I won't say any more comments to your boyfriend.
Q. And you even made a comment to her about potato chips, didn't you?
A. No.

Vol. I, 186:24 - 187:15.

Jay Wilson admitted that he said something that offended the boyfriend, while denying that he had made any comment to Hoover about potato chips.

There is a bizarre logic to his denial of that detail. His testimony (in conflict with the testimony of Hoover) was that Hoover was away from the table when he made the offensive comment. Therefore he could "honestly" deny making a

comment to her about potato chips. Hoover, whose testimony throughout her relatively brief participation in this case was solidly credible, did not say she was away from the table, and did not say that she only learned of the comment from her boyfriend. Under cross examination by counsel for respondents, she reiterated that she was present and herself heard Jay Wilson make the statement to her boyfriend.

> Q. All right. And so let me ask you about this statement you made -- or you talked about the statement Jay made to your boyfriend. That was made to your boyfriend?
> A. Yeah. I mean, I was right there.
> Q. You were right there?
> A. I mean, yeah.

Vol. II, 278:13-19.

Jay Wilson's "honest" denial of making a comment to Hoover about potato chips seems to this Hearing Officer to have been a devious use of technical literal "honesty." He didn't testify that Hoover was present when he made the comment, thus he did not make the comment to her.

Caitlin Hoover was far more believable than Jay Wilson, in part because of how she testified, but also in part because Jay Wilson's testimony and demeanor over the course of this entire hearing established that he could not be trusted to tell the truth. As a result, virtually every other witness was more credible than Jay Wilson, and his twisting efforts to avoid admitting making this particular crude comment to this particular female employee is just one more instance of Jay Wilson not telling the truth.

Failure to Prove a *Faragher/Ellerth* Affirmative Defense

Although it was not well articulated, some of respondents' proof appeared to be aimed at a *Faragher/Ellerth* affirmative defense. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) ***and*** *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The general rule is that an employer is vicariously liable for the discriminatory actions of its supervisory personnel whether or not the employer knew or even had reason to know of the discrimination. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Jay Wilson was both a supervisor of Stover and a co-owner and officer of the corporate employer. On the face of it, the Bum Steer was vicariously liable for everything he said and did. However, in hostile work environment claims where there has been no tangible employment action, there is a limited affirmative defense available to employers. The employer can avoid vicarious liability if it can prove both (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) that the complaining employee unreasonably failed to

take advantage of the preventive and corrective opportunities provided by the employer. *Ellerth*, 524 U.S. ***at*** 765. The employer must prove both elements by a preponderance of the evidence. *Faragher*, 524 U.S. ***at*** 807.

The defense cannot protect either respondent in this case. Jay Wilson, in his management capacity, had total actual knowledge of the harassment, because he was the harasser. The evidence also established that Stover complained to Stewart about some of Jay Wilson's words and actions, and that Stewart knew that Stover was not the first female employee that Jay Wilson had harassed. Bum Steer management took no actions to address the known problems and no actions to address Stover's complaints. Jay Wilson, the harasser and co-owner, was and is personally liable. The corporation is vicariously liable for its co-owner, president and supervisor's atrocious conduct towards Stover. The corporation also received multiple notices and had sufficient knowledge of Jay Wilson's conduct, yet failed to act, and would still be liable no matter what kind of sexual harassment procedures it may have had in place. *Hawkins v. Anheuser-Busch, Inc.,* 517 F.3d 321, 341 (6th Cir. 2008) (employer's sexual harassment policy did not absolve it of liability if it knew or should have known about harassing conduct but failed to respond appropriately). ***See also*** *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864 (9th Cir. 2001) (same holding).

Even if the corporation had proven that it took reasonable steps to prevent and correct harassment (which it did not prove), it did not and really could not prove the second prong of the defense – that Stover unreasonably failed to take advantage of available avenues to seek protection. In fact, the evidence showed that Stover acted reasonably in her efforts to report the harassment.

Stover's fear of complaining about Jay Wilson's sexual harassment to his wife, Sue Wilson, was quite reasonable. On January 19, 2012, Sue Wilson decided not to discharge Stover immediately without further notice, which she very likely could have done based upon Stover cashing an out-of-date gaming ticket. If that day Stover had followed through about making a complaint regarding the "underlying circumstances" and had told Sue Wilson what Jay Wilson had been doing, instead of saying, "Never mind, it's nothing" and signing the disciplinary notice, might Sue Wilson instead have decided upon immediate discharge for the gaming ticket mistake? There is no way to know for certain, but the question illustrates the reasonableness of Stover's fear. With that fear choking off her ability to complain, the notices she gave were more than reasonable.

Stover spoke to Stewart on multiple occasions, and while Stewart either denied or professed not to remember the salient details of what she told him, he admitted enough. From what he admitted it is clear that, at the very minimum, Stover

identified Jay Wilson as the person who was subjecting her to sexual harassment at work, Stover complained about Jay Wilson more than once, and that when Stover's prior complaints led Stewart to ask her after she was moved to day shifts how it was "going" with Jay, she responded by saying it was "better" but still occurring. Even if this was all of the notices that Stover gave, it would have been enough to establish that she took reasonable steps to prevent the harassment. The relevant inquiry is whether the employee adequately alerted the employer of harassment, not whether she followed the letter of any actual reporting procedures set out in the harassment policy. *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 952 (7th Cir. 2005). Accordingly, since she did adequately notify Stewart, the bar failed to prove that an *Ellerth/Faragher* defense applied in this case.

Finally, and decisively, there was tangible employment action, and therefore the bar could not interpose a *Ellerth/Faragher* defense at all. Stover credibly testified that Jay Wilson's harassment kept her off-balance and distracted, which contributed to her difficulties handling money. The bar twice disciplined her for those difficulties handling money. Those were tangible employment actions. When she quit, the precipitating event (the two week suspension) was not proved to be related to the sexual harassment, and was not proved to be illegal retaliation. Nonetheless, one of the reasons Stover quit was to avoid being subjected to continuing and ever escalating sexual harassment, which made Stover's decision to quit a constructive discharge, as already discussed. The constructive discharge was another adverse action by the Bum Steer.

Damages

The department may order any reasonable measure to rectify any harm Stover suffered as a result of illegal discrimination. Mont. Code Ann. §49-2-506(1)(b). Damages are awarded to make the victim whole. ***E.g.,*** *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523. ***See also,*** *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830. To be compensable, the damages must be causally related to making the victim whole, i.e., must come out of the discriminatory acts. Mont. Code Ann. §§ 49-2-506(1)(b); *Berry,* ***supra; see also,*** *Village of Freeport Park Commission v. New York Division of Human Rights,* 41 A.D. 2d 740, 341 N.Y.S. 2d 218 (App. 1973)(loss of earnings which did not flow from the discriminatory act is not compensable as it does not flow from the discrimination). Damages include emotional distress endured as a result of unlawful discrimination. *Vortex Fishing Syst.* ***at*** ¶33.

In employment discrimination, once the charging party has established that her damages flow from the illegal conduct, then there is a presumptive entitlement to an award of lost past earnings. *Berry,* 779 P.2d ***at*** 523-24. To defeat this

presumptive entitlement, the respondent must demonstrate by clear and convincing evidence that a lesser amount of back pay is due the charging party. ***Id.***; ***see also,*** *Benjamin v. Anderson*, ¶62, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039. Prejudgment interest on the back pay (10% per year simple) is also reasonable. *Berry*, 779 P.2d ***at*** 523. The bar is not entitled to an offset for any unemployment insurance benefits that Stover received. *Vortex Fishing Syst.* ***at*** ¶28.

Necessary therapy for the harm Stover suffered in her emotional distress directly flows from the sexual harassment that caused the emotional distress and the PTSD to which her adjustment disorder grew. This is proper "make whole" relief, set at the mid-range of the estimated costs and awarded now. Similarly, the value of the work hours (at a mid-range number of those estimated hours) Stover will miss to obtain the projected therapy is proper "make whole" relief.

On the other hand, Stover offered testimony that distraction and distress caused by sexual harassment at work prevented her from focusing upon and completing her thesis course and timely getting her degree. What she did not provide was evidence of the details of her progress and lack of progress through her thesis course and thesis work, in other words, the details of the timing of work she was able to complete and the details of the timing of work she was not able to complete, to correlate with the timing of the sexual harassment she suffered. She simply painted with far too broad a brush to establish that these alleged harms did actually flow out of the sexual harassment she suffered.

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. As already noted under "Constructive Discharge," Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a ***per se*** invasion of a legally protected interest. Montana does not expect any reasonable person to endure harm, including emotional distress, due to violation of such a fundamental human right. *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351; *Vainio*, p. 16, ftnt. 12; *Campbell v. Choteau Bar and Steak House* (3/9/93), HRC#8901003828.

Vortex Fishing Syst. ***at*** ¶33, succinctly explains emotional distress awards::

> For the most part, federal case law involving anti-discrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints. Because of the "broad remunerative purpose of the civil rights laws," the tort standard for awarding damages should not be applied to civil rights actions. *Bolden v. Southeastern*

Penn. Transp. Auth. (3d Cir.1994), 21 F.3d 29, 34; ***see also*** *Chatman v. Slagle* (6th Cir.1997), 107 F.3d 380, 384-85; *Walz v. Town of Smithtown* (2d Cir.1995), 46 F.3d 162, 170. As the Court said in *Bolden,* in many cases, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts." 21 F.3d at 34 (***quoting*** *Carey v. Piphus* (1978), 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252). Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192, 1193. Furthermore, "the severity of the harm should govern the amount, not the availability, of recovery." *Chatman,* 107 F.3d at 385.

Stover requested $100,000.00 as an appropriate award for her emotional distress. The Hearing Officer will almost never exceed the amount sought by the charging party for emotional distress damages, and the requested amount is neither excessive nor unreasonable as a recovery for the harm resulting from five months of sexual harassment that started with inappropriate language, grew to ugly descriptions of proposed sexual contact, and spun out of control into unwelcome and terrifying "sneak attack" physical sexual contacts forced upon Stover.

Affirmative Relief

When the Hearing Officer finds that one or more respondents have engaged in a discriminatory practice alleged in the complaint, the department is required to order the offending party or parties to refrain from engaging in the discriminatory conduct. Mont. Code Ann. §49-2-506(1). In addition, the order may prescribe conditions upon the future conduct of the offending party or parties relevant to the type of discriminatory conduct found. Mont. Code Ann. §49-2-506(1)(a). The order may require any reasonable measure to correct the discriminatory practice in which the offending party or parties engaged. Mont. Code Ann. §49-2-506(1)(b). The order may also require a report on compliance. Mont. Code Ann. §49-2-506(1)(c). In this case, in addition to the injunction, it is appropriate to require the corporation and Jay Wilson to make changes to how they operate. The details of the changes appear in the order. Some evaluation of how training might assist Sue Wilson in protecting the corporation from similar problems in the future is also reasonable.

Affirmative relief should also include requiring the Bum Steer to invite HRB (and to cooperate with HRB in the process) to evaluate the Bum Steer's policies, procedures and notices regarding sexual harassment and then to take action as

directed by HRB to modify or adopt the appropriate policies, procedures and notices regarding sexual harassment. Finally, respondents should also be required to complete and submit a report of compliance with the affirmative relief within six months after issuance of this Hearing Officer's Decision.

V. Conclusions of Law

1. The Department has jurisdiction over the sexual harassment and retaliation charges made by the complaint of Lyndsay Stover. Mont. Code Ann. §49-2-512.

2. The Bum Steer and Jay Wilson did not illegally retaliate against Lyndsay Stover, in violation of Mont. Code Ann. §49-2-301, for resisting illegal sex discrimination in employment.

3. The Bum Steer and Jay Wilson did illegally discriminate in employment because of sex against Lyndsay Stover, in violation of Mont. Code Ann. §49-2-303(a) and are jointly and severally liable for the reasonable measures necessary to rectify the harm suffered by Stover, as well as for undertaking and completing the affirmative action prescribed by this Order.

VI. Order

1. Judgment is found in favor of Charging Party Lyndsay Stover and against Respondent "Bum Steer," a bar and restaurant located in Florence, Montana, solely owned by a Montana corporation, RJ's Bum Steer, Inc. (a corporation whose shareholders and directors are Respondent Jay Wilson and his spouse, Sue Wilson, each owning 50% of the stock, Respondent Jay Wilson being president of the corporation and Sue Wilson being secretary), which does business as the Bum Steer, and against Respondent Jay Wilson, on the charge that Jay Wilson illegally discriminated in employment because of sex against Lyndsay Stover, during her five months of employment as a bartender by the Bum Steer, from December 2011 until the end of April 2012, by personally and as an agent of the Bum Steer, subjecting her to verbal and physical sexual harassment, and that during that same period of time, the Bum Steer, through its owners and agents, failed and refused to enforce its policies against sexual harassment of employees and failed to protect Stover from Jay Wilson's continuing sexual harassment.

2. The Bum Steer and Jay Wilson are ordered immediately to pay to Stover the sum of $4,060.07 for past lost earnings, $722.87 for prejudgment interest accrued on past lost earnings as of the date of this judgment, $11,400.00 for the reasonable cost of future weekly therapy sessions to remedy and heal as best is possible the emotional trauma and post traumatic stress syndrome of Stover, resulting from the illegal sex discrimination, $3,744.00 for the future lost earnings for

time missed from work to receive the future weekly therapy, and $100,000.00 for emotional distress directly resulting from the illegal sexual harassment, for a total immediately due and owing of $119,926.94, for which amount the Bum Steer and Jay Wilson are jointly and severally liable. Post judgment interest accrues as a matter of law.

3. Affirmative Relief.

(A) The Bum Steer and Jay Wilson are, and each of them, permanently enjoined against inflicting sexual harassment on any employee of the Bum Steer, and against failing and refusing to prevent sexual harassment of any employee of the Bum Steer.

(B) The Bum Steer is hereby ordered to adopt a further policy (as approved by HRB) appointing and empowering an independent person who is not related to the owners of the business by blood or marriage to receive and investigate employee complaints of sexual harassment in the workplace, to report his or her conclusions to the corporation's management, and to verify what actions management has taken upon the recommendations.

(C) To what degree that independent person should also be authorized and/or required to report what he or she deems to be a failure of management appropriately to resolve any employee complaint of sexual harassment to the Montana Human Rights Bureau should be addressed between the Bum Steer and HRB, and HRB is hereby empowered to direct management to include such authorization and/or requirement as a condition of the respondents continuing to do business in Montana, should it be deemed appropriate.

(D) Jay Wilson is hereby ordered to undergo 16 hours of training from a qualified entity approved by HRB, on the range of conduct that is illegal under Montana sex discrimination law, thereafter to take and successfully to pass a test covering the content of the training, as administered and certified by a qualified entity approved by HRB (whether the same or different from the training entity is up to HRB), as conditions of continuing to own, serve as an officer and/or director of, or operate and work for the Bum Steer.

(E) The Bum Steer is ordered to invite HRB (and to cooperate with HRB in the process) to evaluate Sue Wilson's practices of management, hire, discipline and record-keeping, to the end that HRB either require (as conditions of the Bum Steer being owned by Sue

Wilson, having Sue Wilson serve as an officer and/or director, or having Sue Wilson operate and work for the Bum Steer) that she undergo up to 8 hours of training in aspects of management, hire, discipline and record-keeping in which such training would be useful in assisting her to keep the Bum Steer from encountering future sexual harassment problems, or (in the alternative) determine that no such training is needed for her.

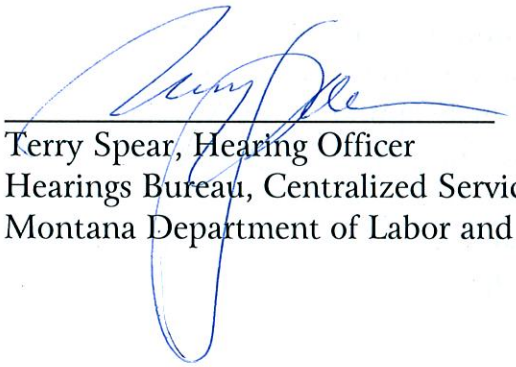
(F) The Bum Steer is ordered to invite HRB to review its policies, procedures and notices regarding sexual harassment and then to take action as directed by HRB to modify or adopt the appropriate policies, procedures and notices regarding sexual harassment.

(G) The Bum Steer and Jay Wilson are ordered to complete and submit a report of compliance with the affirmative relief within six months after issuance of this Hearing Officer's Decision.

4. Judgment is found in favor of Respondent the Bum Steer and Respondent Jay Wilson, and against Charging Party Lyndsay Stover, on the charge that during Stover's employment, both the Bum Steer and Jay Wilson retaliated against her for resisting and opposing the sexual harassment to which both respondents subjected her.

5. The charging of retaliation is hereby dismissed as unproved.

Dated: March 28, 2014.



Terry Spear, Hearing Officer
Hearings Bureau, Centralized Services Division
Montana Department of Labor and Industry

* * * * * * * * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION***

To: Robert Terrazas PC, and Elizabeth A. Clark, attorneys for Lyndsay Stover, and Richard R. Buley, attorney for The Bum Steer and Jay Wilson:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission c/o Marieke Beck
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules. The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. *The original transcript is in the contested case file.*

* * * * * * * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document was, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows, as well as by email to the indicated email address(es):

ROBERT TERRAZAS PC rterrazas@terrazaslaw.com
ELIZABETH CLARK bclark@terrazaslaw.com
TERRAZAS LAW OFFICES
PO BOX 9077
MISSOULA MT 59807-9077

RICHARD BULEY rich@tippandbuley.com
TIPP & BULEY PC
PO BOX 3778
MISSOULA MT 59806-3778

Signed this 28th day of March, 2014.

Sandra Page
Legal Secretary
Hearings Bureau, Montana Department of Labor and Industry

Stover.HOD.tsp